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IN THE

Supreme Court of the United States

October Term, 1980
No.

ALICE J. WILLIAMS,
Appellant,
–vs–
ESTHER V. KRUEGER,
Appellee.

ON APPEAL FROM THE
SUPREME COURT
OF MICHIGAN

JURISDICTIONAL STATEMENT
STATE CIVIL CASE

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NATIONAL REPRODUCTIONS CORPORATION, DETROIT, MICHIGAN

QUESTION PRESENTED

DOES A STATE'S RULE OF PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY AUTHORIZING SERVICE OF PROCESS UPON A PERSON'S LIABILITY INSURER ALONE AS THE BASIS FOR A JUDGMENT IMPOSING PERSONAL LIABILITY UPON THAT PERSON?

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JURISDICTIONAL STATEMENT
STATE CIVIL CASE

OPINIONS BELOW

The Opinion of the Michigan Supreme Court, filed on February 3, 1981, the Opinion of the Michigan Court of Appeals, and the Opinion of the Kent County Circuit Court are set out in the Appendix hereto. The decision of the Michigan Supreme Court is reported as *Krueger* v. *Williams*, 410 Mich. 144, 300 N.W.2d 910 (1981). The decision of the Court of Appeals is reported as *Krueger* v. *Williams*, 71 Mich. App. 638, 246 N.W.2d 360 (1976), *aff'd on rehearing*, 75 Mich. App. 1, 254 N.W.2d 625 (1977). The decision of the trial court is unpublished.

JURISDICTION

The decision of the Michigan Supreme Court in this case was filed February 3, 1981 (21a-43a). It upheld against constitutional challenge the validity of a court rule which was construed to authorize service of process upon an individual's liability insurer as the only means of notice necessary to support a personal judgment against that individual. The case was remanded to the trial court for further proceedings. Notice of appeal to the Supreme Court of the United States was filed with the Michigan Supreme Court and the Kent County Circuit Court on or about March 20, 1981, and an Order Staying Proceedings and Waiving Stay Bond was entered on April 6, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and 28 U.S.C. §2101(c). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973); *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 83 S. Ct. 531, 9 L. Ed. 2d 514 (1963); *Johnson* v. *Muelberger*, 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552 (1951).

CONSTITUTIONAL PROVISIONS AND COURT RULES

U.S. Const. amend. XIV, §1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mich. Const. 1963 art. 1, §17 provides:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

Michigan General Court Rule 105.8 provides:

"The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules."

STATEMENT OF THE CASE

Esther V. Krueger and Alice J. Williams were involved in an automobile accident on May 7, 1971, in which Krueger suffered injury (Complaint, ¶2). At the time of the accident, both were insured by the Detroit Automobile Inter-Insurance Exchange [hereinafter DAIIE] (Transcript, 12/6/74, pp. 25-27). Following the accident, Krueger negotiated her claim with a representative of DAIIE (Transcript, 12/6/74, pp. 25, 29). The claim representative had no contact with Williams (Transcript, 12/6/74, pp. 37-38; Transcript, 4/4/75, pp. 15-16). In fact, DAIIE's only contact with Williams was a letter

received from her in June or July of 1971 (Transcript, 4/11/75, p. 9).

Failing to settle her claim, Krueger filed suit against Williams in March of 1974 (Complaint). All attempts to locate and personally serve Williams were unsuccessful (Affidavits in Support of Motion for Substituted Service).

A copy of the summons and complaint were sent to Williams' last known address by registered mail, return receipt requested. These were returned unopened, marked "Moved — left no address" (Affidavit of Service on Non-Resident). In addition, copies of the summons and complaint were served upon the Secretary of State, Non-Resident Section, and upon Defendant's liability insurer, DAIIE.

A Special Appearance was entered on behalf of Williams by an attorney for DAIIE who challenged the trial court's jurisdiction over Williams for lack of personal service (Motion and Answer). Krueger's attorneys, in turn, filed a motion to allow substituted service, under Michigan General Court Rule [hereinafter G.C.R. 1963] 105.8[1], upon Defendant by serving her insurer by certified mail, return receipt requested (Motion).

RAISING THE FEDERAL QUESTION

Counsel for DAIIE, appearing specially on behalf of Defendant Williams, opposed Plaintiff's motion as being violative of Defendant's "constitutional rights of due process" (Supplemental Brief). The issue was stated as follows:

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[1]The Committee Notes explaining the Rule establish that it is to be construed to authorize any method of service valid under the due process clause of the Fourteenth Amendment to the United States Constitution. 1 Honigman & Hawkins, Michigan Court Rules Annotated, Rule 105.8, Committee Notes, pp. 111-12.

I.

"IF THE TRIAL COURT ALLOWS PLAINTIFF'S MOTION TO SERVE THE DEFENDANT BY SERVICE BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, UPON AAA INSURANCE COMPANY, WOULD SUCH ORDER ALLOWING SUBSTITUTE SERVICE DEPRIVE DEFENDANT OF DUE PROCESS OF LAW BE CONTRARY TO THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BE ALSO CONTRARY TO ARTICLE I, SECTION 17, OF THE MICHIGAN CONSTITUTION OF 1963?"

(Supplemental Brief II).

The trial court denied Plaintiff's motion and dismissed the case without prejudice (1a-6a).

> "The testimony we have received here makes it clear that the agents and employees of the insurance company have not had any contact with the Defendant, Alice J. Williams since 1971; do not know of her whereabouts; and it is clear that service upon the insurance company would not be reasonably calculated to give actual notice to Alice J. Williams.
>
> Therefore, the motion for substituted service upon the insurance company is denied."

(1a).

Plaintiff Krueger took an appeal of right to the Michigan Court of Appeals. The Court of Appeals affirmed the dismissal of the complaint in a published opinion which did not reach the question of whether the trial court abused its discretion in denying Plaintiff's motion for substituted service on Defendant's insurance company under G.C.R. 1963, 105.8 (6a-12a).

On rehearing (13a), the Court of Appeals, in another published opinion, considered the issue it had failed to reach previously (14a-18a). It held that the trial court did not abuse its discretion in denying Plaintiff's motion for substituted service. The Court concluded that substituted service on Defendant's insurance company would be unlikely to give Defendant actual notice of the proceedings and an opportunity to be heard, and it reaffirmed the dismissal of the complaint.

Plaintiff Krueger was granted leave to appeal to the Michigan Supreme Court (19a). The parties were "directed to include among the issues to be briefed whether the trial court erred by refusing to allow plaintiff substituted service of process upon the defendant's liability insurer" (19a).

The Michigan Supreme Court filed its opinion in the instant case and its companion case, *Rodgers* v. *Davis*, on February 3, 1981 (21a-43a). The Court framed the issues for decision in this case as follows:

> "The arguments in the Krueger case involve two issues: 1) will service of process upon a defendant's liability insurer comport with the guarantees of due process of law and enable our courts to exercise jurisdiction, and 2) did the lower court err by not allowing plaintiff to use some method of substituted service of process to serve an absent defendant."

(29a)

The Michigan Supreme Court concluded "that jurisdiction was proper in Michigan courts and that litigation here does not offend the due process rights of defendants" (29a). It further held that the lower courts erred by not allowing substituted service on Defendant's insurance company under G.C.R. 1963, 105.8, upheld the validity of such service against Defendant's due process challenge, and remanded the case for further proceedings.

THE DECISION IS FINAL

Although there are further proceedings to follow in the state courts, the Michigan Supreme Court's decision is final within the meaning of 28 U.S.C. §1257(2). The Michigan Supreme Court's final assertion of state court jurisdiction over Appellant in the face of her constitutional challenge to that jurisdiction is not subject to further review in the subsequent state court proceedings. *Leland* v. *Ford*, 252 Mich. 547, 548, 233 N.W. 410, 411 (1930); *Pierce* v. *Riley*, 81 Mich. App. 39, 43, 264 N.W.2d 110, 113 (1978) ("A conclusion reached in an earlier appeal to the Michigan Supreme Court becomes the law of the case and is not subject to review on appeal from a subsequent trial.") Furthermore, the decision on the federal issue is wholly separate from and independent of the merits of the proceedings to come. Under such circumstances, the decision is ripe for review. *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 548-49, 83 S. Ct. 531, 536, 9 L. Ed. 2d 514, 519 (1963); *Johnson* v. *Muelberger*, 340 U.S. 581, 583, 71 S. Ct. 474, 476, 95 L. Ed. 552, 555 (1951). *See also Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 485, 95 S. Ct. 1029, 1041, 43 L. Ed. 2d 328, 344 (1975); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162, 94 S. Ct. 407, 412, 38 L. Ed. 2d 379, 385 (1973). *See Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12, 97 S. Ct. 2569, 2575 n.12, 53 L. Ed. 2d 683, 692 n.12 (1977).*Cf. The General Council on Finance and Administration, United Methodist Church* v. *California Superior Court*, 439 U.S. 1369, 1371-72, 99 S. Ct. 35, 37, 58 L. Ed. 2d 77, 80 (1978).

Another ground for sustaining this Court's jurisdiction is that refusal to review immediately the decision of the Michigan Supreme Court on the constitutional issue herein raised threatens serious erosion of federal policy — here the due process guarantee of notice prior to an affirmative imposition of liability. If, at trial, Appellant were to prevail on the merits

on the question of liability, the federal issue would be moot, but an erroneous decision on a constitutional issue involving serious public consequences would remain. *Miami Herald Publishing Company* v. *Tornillo*, 418 U.S. 241, 246 n.6, 94 S. Ct. 2831, 2834 n.6, 41 L. Ed. 2d 730, 735 n.6 (1974); *North Dakota State Board of Pharmacy, supra*, at 159, 94 S. Ct. at 410, 38 L. Ed. 2d at 383. Moreover, reversal of the final decision of the Michigan Supreme Court on the federal issue would preclude further proceedings in the instant case. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558, 83 S. Ct. 520, 522, 9 L. Ed. 2d 523, 526 (1963).

In sum, it is imperative that the judgment in the instant case be treated as final. There is no suggestion that further federal questions will be decided on remand, the federal issue finally decided by the Michigan Supreme Court is separable from, and collateral to, the issues in the later proceedings, and reversal of the final decision of the Michigan Supreme Court on the federal issue would preclude further proceedings in the instant case. *See Shaffer* v. *Heitner, supra*, at 195 n.12, 97 S. Ct. at 2575 n.12, 53 L. Ed. 2d at 692 n.12; *North Dakota State Board of Pharmacy, supra*, at 162, 94 S. Ct. at 412, 38 L. Ed. 2d at 385. *See also National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44, 97 S. Ct. 2205, 2206, 53 L. Ed. 2d 96, 98 (1977).

THE QUESTION IS SUBSTANTIAL

The issue in this appeal is whether a state's rule of procedure violates the due process guarantees of the Fourteenth Amendment to the United States Constitution by authorizing service of process upon an individual's liability insurer as the only means of notice necessary to support a personal judgment against that individual where her whereabouts are neither known nor ascertainable.

The determination of the question herein posed has national implications. At issue is more than the validity of one state's practice. Rather, the focus of inquiry here is upon the constitutional parameters limiting the extent to which any state can dispense with the requirement of a meaningful method of notice prior to the imposition of personal liability upon an individual. The importance of those parameters is underscored by the trend toward defining permissible methods of service to the limits allowed by the United States Constitution. *E.g., Hutchins* v. *Del Rosso,* 116 N.H. 421, 365 A.2d 127, 129 (1976); *Avdel Corporation* v. *Mecure,* 58 N.J. 264, 277 A.2d 207, 209 (1971); *Dobkin* v. *Chapman,* 21 N.Y.2d 490, 236 N.E.2d 451, 458, 289 N.Y.S.2d 161 (1968); *First Wyoming Bank* v. *Trans Mountain Sales & Leasing, Inc.,* 602 P.2d 1219, 1221 (Wyo. 1979).

Furthermore, the import of a decision on the issue presented is not limited to the type of case here involved. Although its primary impact will probably be upon the significant number of automobile personal injury claims filed in state courts, this Court's decision will necessarily affect any action against a missing individual whose liability insurance arguably covers the damages alleged in the complaint. In addition, the principle relied upon by the Michigan Supreme Court (that the carrier is "likely to have an interest" in finding the missing defendant) would justify the type of service allowed by the Michigan Supreme Court upon a much broader category of entities than insurers (e.g., banks, creditors). Clearly, the ramifications of permitting the kind of service authorized in the instant case extend well beyond the present circumstances.

The method of service of process authorized by the Michigan Supreme Court in the instant case is one example of a trend to authorize substituted service of process in actions to impose affirmative personal liability even in the acknow-

ledged absence of any likelihood of actual notice. *See, e.g., Sommers* v. *Gaston,* 295 A.2d 578 (Del. Super. Ct. 1972) (authorizing service of process by registered mail to an address at which it was already determined defendant did not reside); *Manley* v. *Nelson,* 50 Hawaii 484, 443 P.2d 155 (1968), *cert. denied sub. nom. Soszka* v. *Manganaro,* 394 U.S. 573, 89 S. Ct. 1299, 22 L. Ed. 2d 555 (1969) (authorizing service by publication in a Hawaii newspaper after ascertaining that the defendant was not in the state); *Feuchtbaum* v. *Constantini,* 59 N.J. 167, 280 A.2d 161 (1971); *Dobkin* v. *Chapman,* 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968). *But see Smith* v. *Commercial Union Assurance Company,* 246 Ga. 50, 268 S.E.2d 632 (1980) (no personal judgment against defendant, nor liability on the part of his insurer, where defendant's whereabouts are unknown).

Courts permitting service of process which is admittedly fictional and unrealistic not only obscure the primary purpose of ensuring that defendants receive notice of pending actions, but also effectively avoid any real limitations imposed by the due process guarantee of notice. The effect of piecemeal authorization of such methods of service of process is a steady erosion of its constitutional purpose. This is apparent from the opinions of the highest courts of the two other states that have upheld service on defendant's insurance carrier as sufficient notice to sustain a personal judgment against the defendant.

In *Dobkin* v. *Chapman, supra,* the New York Court of Appeals authorized plaintiff to serve process on defendant by delivering a copy of the summons to defendant's insurance carrier and by mailing a copy thereof to defendant's last known address (at which it had previously been determined that defendant did not reside). The New York court effectively conceded that, as a practical matter, the authorized method of

service was not expected to give actual notice to defendant. 236 N.E.2d at 458-59.

The court relied on *Mullane* v. *Central Hanover Bank & Trust Company,* 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), to permit service of process in the absence of any probability of notice to defendants. 236 N.E.2d at 458. Although it recognized the substantial differences between the circumstances of the *Mullane* case and those of the case before it, 236 N.E.2d at 458, the New York court failed to address the effect of those differing circumstances as a factor to be considered in determining the question of adequate notice. (This aspect of *Dobkin* will be further discussed below). Instead, the court held that service on the insurer and mailing to defendant's last known address satisfied the due process requirement of adequate notice, relying on the following findings: (1) defendants were responsible for the inability of plaintiffs to directly serve process because they moved without informing anyone of their whereabouts, *id.* at 459, (*but see Feinstein* v. *Bergner,* 48 N.Y.2d 234, 397 N.E.2d 1161, 1164, 422 N.Y.S.2d 356 (1979) (finding that a potential defendant has no affirmative duty to inform potential plaintiffs of his whereabouts); (2) the insurer was the real party in interest, 236 N.E.2d at 459, (*but see Rush* v. *Savchuck,* 444 U.S. 320, 330-31 & n.20, 100 S. Ct. 571, 62 L. Ed. 2d 516, 526-27 & n.20 (1980) (rejecting the real-party-in-interest status of defendant's insurer); (3) denial of substituted service would be unfair to plaintiffs and harmful to the public interest. 236 N.E.2d at 458-59.

In *Feuchtbaum* v. *Constantini, supra,* the New Jersey Supreme Court permitted service on defendant's insurance carrier and ordinary mail to his last known address where defendant's whereabouts were unknown. 280 A.2d at 168. Following *Dobkin,* the New Jersey court determined the scope of the due process notice guarantee by allegedly balancing the respective interests of the plaintiffs, defendants and the state. *Id.* at 166.

Conceding that the method of service under the circumstances was "far from certain" to provide defendant with any notice of the action, *id.* at 166, the court nevertheless held that service on the insurer was fair to the defendant. As in *Dobkin*, the New Jersey court reasoned that defendant's own behavior (in failing to keep potential plaintiffs posted of his whereabouts) was responsible for depriving him of notice, that the insurer's interests coincided with defendant's interests, and that defendant had an opportunity to seek relief from the judgment against him. *Id.* at 166.

Again as in *Dobkin*, the New Jersey court authorized a method of service which admittedly had no probability of providing notice to defendant. It did so in reliance on *Mullane, supra*, but without accounting for the different legal consequences resulting from the *Mullane* action as opposed to the case before it. As discussed below, principled analysis of the due process right to notice is not possible without considering that crucial difference. The growing trend in the state courts to impose affirmative and potentially unlimited liability in the acknowledged absence of any reasonable probability of notice makes it imperative that this Court finally determine the issue of adequate notice in such actions.

No decision of this Court has addressed the question whether service of process upon a person's liability insurer alone is constitutionally adequate to support a judgment affirmatively imposing personal liability upon the insured. In only three cases has this Court discussed the quality of notice necessary to support a personal judgment, and nothing in those cases provides a definitive answer to the question herein presented.

In *McDonald* v. *Mabee*, 243 U.S. 90, 37 S. Ct. 343, 61 L. Ed. 608 (1917), this Court held that publication in a local newspaper was insufficient notice to sustain a personal judgment against a domiciliary of the forum state who had left the state,

not intending to return. In its analysis, this Court stated that a substitute for personal service must be the method "most likely to reach the defendant . . . if substantial justice is to be done." *McDonald,* 243 U.S. at 92. However, this Court then suggested that the outer limits of sufficient substituted service upon an individual would be service "at the last and usual place of abode." *Id. See* Fed. R. Civ. P. 4(d) (1).

In *Wuchter* v. *Pizzutti,* 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446 (1928), this Court held that a state provision would not pass constitutional muster if it permitted a personal judgment against an individual without requiring some communication to him which would "make it reasonably probable that he will receive actual notice." *Wuchter,* 276 U.S. at 19.

Finally, in *Milliken* v. *Meyer,* 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940), this Court stated in *dicta* (the defendant in that case had received actual notice as the result of the service effected) that the adequacy of notice to sustain a personal judgment would depend upon whether it was "reasonably calculated" to give the defendant actual notice of the proceedings.

Although the foregoing three cases apparently reject any method of service with no reasonable probability of notifying an individual of proceedings seeking to impose personal liability upon him, they provide no definitive answer to the issue under discussion. A significant factor contributing to that uncertainty is the as yet undefined effect of *Mullane* v. *Central Hanover Bank & Trust Company, supra,* upon such proceedings.

In *Mullane,* this Court stated that service by publication was constitutionally sufficient as to beneficiaries of a trust fund whose interests or whereabouts could not be ascertained through the exercise of reasonable diligence. This Court stated that "in the case of persons missing or unknown, em-

ployment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, 339 U.S. at 317. Reasoned analysis of two aspects of the *Mullane* decision demonstrates its inapplicability to actions seeking to impose personal liability upon an individual.

First, the proceedings in *Mullane* did not concern the imposition of liability upon individuals, but rather the foreclosing of rights in certain property. The distinction is significant. A decision concerning property rights is a systemic necessity, whereas the imposition of tort liability is not. Moreover, the impact of a decision foreclosing rights in property is inherently limited, whereas a personal tort judgment is potentially unlimited.

The systemic necessity of the possibility of a decision foreclosing property rights is rooted in the very nature of our society. It is inherent in our system of government that there are certain types of cases in which it is absolutely imperative that a decision concerning the subject matter of the action be possible under *all* circumstances, including the absence of some of the interested parties. A system premised upon private ownership of property would eventually cease to function viably without some means of determining rights in property under any and all circumstances. Similarly, social necessity mandates that certain determinations concerning status (e.g., divorce) be possible in all situations. In such cases, the possibility of some decision is a matter of systemic necessity. The reasoning underlying this Court's decision in the *Mullane* case recognized that fact:

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. ***But the vital interest of the State in bringing any issues as to its fiduciaries to final settlement can be served only if interests or claims of individuals who are outside of***

> *the State can somehow be determined.* A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."

Mullane, 339 U.S. at 113-14 (emphasis added.)[2] Furthermore, in concluding that the absence of any notice to certain of the interested trust beneficiaries was a "justifiable" and "reasonable risk" under the circumstances, this Court relied upon the presence of parties actually notified whose interests in the property were identical to those of the unnotified persons. 339 U.S. at 319. The distinction between the type of case involved in *Mullane,* and personal injury cases has been noted. *E.g., Dobkin* v. *Chapman,* 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968); Note, *Civil Procedure — Constitutionality of Constructive Service of Process on Missing Defendants,* 48 N.C.L. Rev. 616, 622 n.30 (1970).

On the other hand, actions seeking to impose affirmative liability upon a defendant are governed by quite different considerations. First, the systemic necessity for a decision under all circumstances is absent. Although both an injured party and the state have an interest in providing a means whereby the former can recover money damages for his injuries, that interest is by no means "vital" in the same sense as the ability to determine interests in property or other matters affecting the very viability of the governmental system.

Moreover, the affirmative nature of the liability imposed in a personal injury action is more momentous in kind and scope than the "foreclosure of rights" regarding particular property or status. Such affirmative liability exposes all of a person's

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[2]The two subsequent notice decisions reaffirming and applying the *Mullane* analysis both involved the disposition of real property. *Schroeder* v. *City of New York,* 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962); *Walker* v. *City of Hutchinson,* 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956).

assets (save those specifically protected) to further judicial action to enforce the default judgment. Thus, the subject matter and the ramifications of the *Mullane* decision were different in kind from cases such as the instant one.

Second, the approval of a "probably futile" method of notification in *Mullane*, if applied to the type of case here involved, conflicts with the requirement imposed in *Wuchter* v. *Pizzutti*, *supra*, that the notification necessary to a tort defendant be "reasonably probable" to give him actual notice of the action. In this regard it should be noted that the latter case was cited with apparent approval by the *Mullane* Court. 339 U.S. at 315. Given that the degree of notice "appropriate to the nature of the case", 339 U.S. at 313, will vary depending upon the nature of the interests involved and the extent and seriousness of the consequences to the party entitled to notice, it is apparent that *Mullane* did not decide the issue presented in the case-at-bar.

The only relatively recent disposition of this Court in any way related to the question here involved was this Court's denial of certiorari in *Manley* v. *Nelson*, 50 Hawaii 484, 443 P.2d 155 (1968), *cert. denied sub nom. Soszka* v. *Manganaro*, 394 U.S. 573, 89 S. Ct. 1299, 22 L. Ed. 2d 555 (1969). That disposition, however, provides no basis for declining to entertain the appeal in the instant case.

The question present in *Nelson* was characterized by the appellant/petitioner as involving a concededly "singular and unprecedented" service by publication provision in a particular state's nonresident motorist statute. *Nelson* v. *Manley*, *supra*, Jurisdictional Statement at 10. No persuasive reason was advanced for this Court to hear an appeal and render a decision whose applicability would be limited to the degree suggested by the appellant/petitioner's characterization of the issue. As indicated above, the trend toward imposing personal liability

in the absence of any reasonably likely notice to the defendant is not a phenomenon restricted to isolated instances.

Furthermore, the appellant/petitioner in *Nelson* failed to bring to this Court's attention the fundamental and inherent distinction (discussed above) between judgments imposing personal liability, *see, e.g., Wuchter* v. *Pizzutti, supra; McDonald* v. *Mabee, supra,* and those involving merely a foreclosure of rights with regard to certain property or status, *see, e.g., Mullane* v. *Central Hanover Bank & Trust Company, supra.* That distinction, although necessary to a well-reasoned determination of the issue, is not so apparent on the face of this Court's prior opinions as to warrant the presumption that this Court considered it in response to the limited legal exposition in the *Nelson* Jurisdictional Statement.

Finally, whatever precedential value is accorded the disposition in *Nelson,* it is undeniable that there has been no general recognition that it answered the question of adequate notice to support a personal judgment. Reference to the commentary discussing that issue and related matters since 1969 suggests that the question posed requires a more definitive answer. *See* Note, *Service of Process by Mail,* 74 Mich. L. Rev. 381 (1975); Note, *Must Service of Process Be Personal in Order to Obtain In Personam Jurisdiction?* 35 Mo. L. Rev. 269 (1970); Note, *Civil Procedure — Constitutionality of Constructive Service of Process on Missing Defendants,* 48 N.C.L. Rev. 616 (1970); Note, *Constitutional Law: The Validity of Service of Process by Mail When There Is No Return Receipt: The Outer Limits of Due Process,* 25 Okla. L. Rev. 566 (1972); Note, *Service by Publication on a Defendant Who Cannot Be Located in California,* 3 U.S.F.L. Rev. 320 (1969).

Despite the absence of a definitive pronouncement from this Court on the question, Appellant submits that the principles established by this Court's prior decisions and the nature of the liability involved compel the conclusion that the type of

notice authorized by the court rule in this case cannot pass constitutional muster. The Michigan Supreme Court clearly erred in holding that G.C.R. 1963, 105.8 constitutionally authorizes service of process upon a person's insurer alone as the basis for a personal judgment against the insured.

A judgment imposing personal liability upon an individual cannot be sustained in the absence of a method of notification rendering it reasonably probable that he will receive actual notice of the proceedings. *Wuchter* v. *Pizzutti, supra.* Although receipt of actual notice is not necessary in this regard, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Company, supra; McDonald* v. *Mabee, supra,* substitutes for personal service must not "let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald,* 243 U.S. at 91.

The "service" of process in the instant case was the purest of fictions. The Michigan Supreme Court conceded that the individual Defendant could not be notified of the pendency of the action against her by any means (32a). The closest the court came to confronting that fact was its assertion that "the carrier is likely to have an interest in finding [her]." (34a)

Appellant's response is twofold. First, the person with the *most* interest in locating the individual Defendant was Plaintiff. If, given the paramount importance of locating Defendant, Plaintiff was unable to do so, there is no reason to expect anyone else to be more successful. Second, the insurer's "interest" in finding the individual would not exist but for the Michigan Supreme Court's decision in the instant case. Thus, under the guise of analysis, the court did no more than state its conclusion, i.e., that because the insurer can be served and compelled to defend an action without the benefit of its best or only witness (the individual Defendant), it therefore has an interest in finding her. The circularity of that argument is seductive until one realizes that Plaintiff, the person with the greatest interest in locating the individual Defendant, has

been unable to do so. Therefore, the net effect of the decision in the instant case was to shift the burden of notifying the individual Defendant (and the consequences of failing to do so) from Plaintiff to Defendant's insurer. There exists no principled reason for so doing.

The insurer was not a party to the instant case. Nor can service of process upon the insurer be justified on the basis that it was the "real party in interest". In a related context, this Court unequivocally rejected the proposition that an individual's due process protection could be circumvented by treating his insurer as having the primary interest in the action. *Rush* v. *Savchuck*, 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980).

Nor can service of process upon the insurer be justified on the basis of an agency theory. The Michigan Supreme Court conceded that there existed no express agency to accept service of process (33a), and did not even attempt to fashion an implied agency to do so. Rather, the court cryptically cited the insurer's "representative role" as being "relevent when process cannot otherwise be served upon the insured" (33a). This argument is also circular. The ability of a court to bring the insured before it is analytically prerequisite to the insurer's obligation to defend the action. *See Rush* v. *Savchuck*, 444 U.S. at 430-31. Thus, service of process upon the insurer in the instant case cannot be justified on the basis of any agency or representative capacity.

Furthermore, the type of service of process authorized in the instant case cannot be justified on policy grounds by balancing the respective interests of plaintiffs, defendants and the state.

The plaintiff's interest is always the same: to have a source of recovery. The primary obstacle to insuring such recovery against a missing defendant is, of course, the statute of limita-

tions. The obvious and straightforward manner of avoiding that bar is to provide for the tolling of the statute of limitations during the period that plaintiff cannot, through the exercise of reasonable diligence, identify or locate the defendant. Although involving some inconvenience and uncertainty (given the impairment of evidence through the passage of time), such a compromise is eminently preferable to denying a defendant any trial at all prior to the imposition of considerable personal liability.

The defendant's interest, of course, is to be afforded an opportunity to defend the action prior to imposition of such liability. Regardless of any mitigating measures suggested to reduce the impact of such a judgment, there is no adequate substitute for the defendant's actual presence to defend himself. The contention that the insurer's presence will assure the fairness of the proceedings ignores that the defense at trial in such cases must be conducted in the absence of the defendant, who is the best (and in some cases the only) witness for the defense. Characterizing such a trial as a "fair proceeding" exalts form over substance.

This Court should also note that the justifications customarily advanced in favor of resolving the problem in favor of the plaintiff necessarily *assume* the absent defendant's liability. *See, e.g., Dobkin* v. *Chapman, supra; Feuchtbaum* v. *Constantini, supra;* Note, *Civil Procedure — Constitutionality of Constructive Service on Missing Defendants,* 48 N.C.L. Rev. 616 (1970). Although such a presumption may be appropriate for underscoring the difficulty facing a plaintiff unable to locate a potential defendant, it hardly provides a principled basis for decision of the question under discussion. The fact remains that "due process" is a hollow phrase to a person upon whom large individual liability has been imposed in the absence of an opportunity to defend himself.

The state's interests do not preponderate in favor of either a plaintiff or an absent defendant. It has a self-evident interest in maintaining the integrity of its legal process by insuring that final judgments are rendered only after the fairness of the proceedings is assured. On the other hand, providing injured citizens a source of judicial recovery for tortiously inflicted injuries is also a legitimate concern. However, nothing inherent in either of those considerations renders one predominant.

Moreover, in personal injury cases, the *necessity* for the state to provide a method of determination is absent. *See Mullane; supra.* Thus, the conceptual vehicle for justifying dispensing with a meaningful notice requirement, which is legitimately invoked in property and status cases, is not available here.

In short, neither the plaintiff's interest nor those of the state provide a sufficient principled basis upon which to eliminate the absent defendant's rudimentary right to reasonable notice of an action against him. It is noteworthy in this regard that the Michigan Supreme Court did not even attempt an analytical explanation of its decision.

In the instant case, the Michigan Supreme Court based its decision upon three discernible propositions: (1) under *Mullane* v. *Central Hanover Bank & Trust Company, supra,* service upon the insurer provided a better chance of notifying the individual Defendant than other available alternatives; (2) service upon the insurer was justified because of its "representative role" in the action; (3) the courts of New York and New Jersey have recognized the validity of such actions. None of those grounds provide principled support for the decision in the case-at-bar.

The inapplicability of the *Mullane* test to actions imposing personal liability upon an individual has already been demonstrated. The absence of any systemic necessity for a decision in

such a case and the existence of authority from this Court apparently imposing more stringent notice requirements in such cases, *Wuchter* v. *Pizzutti, supra,* militate strongly against blindly applying the *Mullane* test without reference to the context in which it was promulgated. In short, without pertinent discussion, the Michigan Supreme Court applied the *Mullane* formula to impose affirmative liability upon an individual in a case not involving matters which must always be capable of determination.

The circularity of the "representative role" rationale has been discussed above. Its inclusion as "analysis" in the opinion in the instant case does little more than demonstrate the absence of any legal and principled justification for the decision.

The reasoning in the sister-state authority relied upon by the Michigan Supreme Court is demonstrably deficient with regard to considerations previously discussed. In fact, both *Feuchtbaum* v. *Constantini, supra,* and *Dobkin* v. *Chapman, supra,* illustrate the circularity of the justifications advanced for the type of service allowed here.

In both cases, the respective courts cited *Mullane, supra,* as authorizing service of process upon an insurer where the individual defendant cannot be located. The *Dobkin* court recognized that *Mullane* "involved a situation quite different from that with which we are now concerned", *Dobkin,* 236 N.E. 2d at 458, but seemed untroubled by the distinction. The *Feuchtbaum* court interpreted this Court's rejection of the *in personam/in rem* distinction in *Mullane* as obliterating any pertinent distinction between the foreclosing of rights in property and the affirmative imposition of liability upon an individual. The latter distinction (discussed above) was not addressed in *Feuchtbaum.*

Appellant points out that she does not premise her position on the *in personam/in rem* distinction *per se*, which was properly rejected by this Court in *Mullane*. Indeed, Appellant concurs that such a distinction is not useful for present purposes for two reasons: the vagaries of state law preclude a nationally uniform characterization of actions on that basis; and any rule premised upon such a distinction would turn on considerations not relevant to the factors properly dispositive of the quality of notice appropriate to a given type of case. In contrast, the distinction advanced provides a principled and workable basis for decision because it is grounded on considerations which focus upon the nature of the consequences of the action rather than upon the label attached thereto.

In short, neither *Dobkin* nor *Feuchtbaum* provide any principled justification for applying the *Mullane* notice formula concerning missing trust beneficiaries to an action seeking to impose personal liability upon an individual.

A second flaw common to both *Dobkin* and *Feuchtbaum* is the skewed and incomplete nature of the alleged balancing of interests upon which they base their respective results. With regard to the state's interest, neither case even pays lip service to the interest in maintaining the integrity of the state's judicial service by insuring the actual and practical fairness of proceedings culminating in personal liability upon an individual.

With regard to the defendant's interest, the analysis in those cases was skewed in two ways. First, neither opinion confronted the critical interest of a defendant in being present to testify in his own behalf and thus providing the best (and possibly only) defense witness. Second, both opinions premised their discussion upon the assumptions that: (1) defendants in such cases were involved in (and, therefore, have knowledge of) the accidents in question; and (2) defendants in such cases were factually and legally responsible for the accident.

Resolving such matters against the absent party hardly provides a principled basis for determining whether an action against him may proceed in the absence of any meaningful notice to him.

Operating upon the foregoing assumptions, the discussions in *Dobkin* and *Feuchtbaum* regarding the factor termed "fairness to the defendant" are no more than polemics against presumably liable persons who are presumably at least negligent in not maintaining proper contact with their insurers, the authorities, or the presumably injured plaintiff. In short, both the *Dobkin* and *Feuchtbauim* courts appear to have had their respective judicial thumbs on the scales of justice during their "balancing" of the pertinent interests.

Both courts exhibit a preoccupation with plaintiffs' interests at the expense of any serious consideration of more pertinent factors. Such an approach demonstrates a shift in focus away from analysis of the ramifications of, and justifications for, dispensing with a meaningful notice requirement in actions imposing personal liability upon an individual. Both courts focused almost exclusively upon plaintiff's situation. Given that the constitutional right involved is defendant's, such an analysis fails to address, much less answer, the central question involved. *Cf. Rush* v. *Savchuck,* 444 U.S. at 332.

A third conceptual flaw common to those cases is that both *Feuchtbaum, see White* v. *Austin,* 172 N.J. Super. 451, 412 A.2d 829 (1980), and *Dobkin* were ultimately premised upon their perception of the insurer as the "real party in interest". As has already been pointed out, this Court recently rejected the substitution of the insurer's interest for that of the individual for purposes of due process analysis. *Rush* v. *Savchuck, supra.*

Finally, both *Dobkin* and *Feuchtbaum* provide no satisfactory answer to the objection that an insurer has no "duty to defend" its insured until he is constitutionally brought before a

court with authority to enter a judgment against him. Neither those cases nor the instant one could have yielded their respective results without logically inverting the relationship between the insurer's obligations and the prerequisites thereto. *See Rush* v. *Savchuck, supra.*

The constitutional validity of the type of service authorized in the instant case is an issue not yet decided by this Court. The distinctions between the nature of the action here involved and the one before this Court in *Mullane* v. *Central Hanover Bank & Trust Company, supra,* preclude the blind application of the latter case to the instant one. Consideration of the prior decisions of this Court concerning the quality of notice required for a personal judgment and of the factors pertinent to that question demonstrates the inadequacy of the service of process approved in the case-at-bar. Those state court decisions reaching an opposite conclusion are bereft of any principled justification for their results.

CONCLUSION

This Court should summarily reverse the decision of the Michigan Supreme Court and remand this case to that Court with instructions to affirm the trial court's dismissal of this action.

Alternatively, this Court should accept the case for plenary review either as an appeal or, pursuant to 28 U.S.C. §2103, as a petition for certiorari granted.

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May, 1981

80-1862

Office-Supreme Court, U.S.
FILED
MAY 4 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980
No.

ALICE J. WILLIAMS
Appellant,
-vs-
ESTHER V. KRUEGER,
Appellee.

ON APPEAL FROM THE
SUPREME COURT
OF MICHIGAN

APPELLANT'S APPENDIX

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MAY, 1981

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TRIAL COURT OPINION

(Transcript, April 11, 1975, pp 16-18)

THE COURT: With respect to your motion for substituted service upon the insurance company, rule 105.6 of General Court Rules of 1963 as amended, the Court in which an action has been commenced may in its discretion allow service of process to be made upon the Defendant and any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to heard. If an order permitting such service is entered before service of process is made, upon showing to the Court that service of process cannot reasonably be made in the manner provided for under those rules; and the committee comment under that rule states, this provision is included to give the Court discretion to allow the service of process to be made in the manner in which satisfied the language of *Millikan* versus *Myer,* 311 US 457, 61, Supreme Court 339, 85, Lawyers Edition 278, re-hearing denied, 312 U.S. 712, 61, Supreme Court 548, 85, Lawyers Edition 1143.

That is a method reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard.

The testimony we have received here makes it clear that the agents and employees of the insurance company have not had any contact with the Defendant, Alice J. Williams since 1971; do not know of her whereabouts; and it is clear that service upon the insurance company would not be reasonably calculated to give actual notice to Alice J. Williams.

Therefore, the motion for substituted service upon the insurance company is denied.

I think both of you are in agreement that the attempted service upon Alice J. Williams at Route 2, Box 165A, Hope, Arkansas, did not constitute — did not comply with the requirements of the Statute 9.2103, MSA in that the registered letter was unopened and was marked, 'moved, left, no address,' and pursuant to *Tumkin* versus *Sauceda*, 374 Mich 381, a 1965 case, there was not service on the Defendant, Alice J. Williams.

Therefore, there has been no service upon Alice J. Williams within 180 days from the filing of the complaint and summons. It is my opinion that the motion of the Defendant to mandamus the Clerk to dismiss the complaint should be granted.

ORDER GRANTING WRIT OF MANDAMUS

STATE OF MICHIGAN
CIRCUIT COURT FOR THE
COUNTY OF KENT

ESTHER V. KRUEGER,
Plaintiff,

-vs-

ALICE J. WILLIAMS,
Defendant.

File No.
74-15502-NI

ORDER GRANTING
WRIT OF
MANDAMUS

Order Granting Writ of Mandamus

At a session of said Court held in the Hall of Justice in the City of Grand Rapids, Kent County, Michigan, this 11th day of April, 1975.

PRESENT: HONORABLE ROMAN J. SNOW, Circuit Judge

This matter having come on to be heard by reason of a Complaint for Mandamus, and it appearing to this Honorable Court that the Writ should be awarded,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Writ of Mandamus shall be awarded and the Kent County Clerk shall forthwith enter an Order of Dismissal as to the within defendant without prejudice.

ROMAN J. SNOW
Circuit Court Judge

Examined, Countersigned and
Entered by me:
M. A. DIEDRICH

ORDER OF DISMISSAL

STATE OF MICHIGAN
CIRCUIT COURT FOR THE
COUNTY OF KENT

ESTHER V. KRUEGER,
Plaintiff,

-vs-

ALICE J. WILLIAMS,
Defendant.

File No.
75-15502-NI

ORDER OF
DISMISSAL

Pursuant to a Court Order entered in the within cause, I, Harold Bertelson, do hereby enter an Order of Dismissal as to defendant, Alice J. Williams, hereby dismissing her from the within lawsuit, without prejudice.

DATED: April 11, 1975.

HAROLD BERTELSON,
DEPUTY CLERK

ATTEST: A TRUE COPY
JACK BRONKEMA, CLERK

ORDER DENYING SUBSTITUTED SERVICE

STATE OF MICHIGAN
CIRCUIT COURT FOR THE
COUNTY OF KENT

ESTHER V. KRUEGER,
Plaintiff,

-vs-

File No.
74-15502-NI

ORDER

ALICE J. WILLIAMS,
Defendant.

At a session of said Court held in the Hall of Justice in the City of Grand Rapids, Kent County, Michigan, this 18th day of April, 1975.

PRESENT: HONORABLE ROMAN J. SNOW, Circuit Judge

This matter having come on to be heard and the Court having fully heard arguments in open Court, and the Court having decided that plaintiff's Motion for an Order Allowing Substituted Service upon the defendant by serving the AAA Insurance Company should be denied,

NOW, THEREFORE, IT IS HEREBY ORDERED that plaintiff's Motion for an Order Allowing Substituted Service upon the AAA Insurance Company is hereby denied.

IT IS FURTHER ORDERED that this Order shall be entered Nunc Pro Tunc to the date of the opinion given by this Court, such date having been Friday, April 11, 1975.

ROMAN J. SNOW
Circuit Court Judge

Examined, Countersigned and
Entered by me:
M. A. DIEDRICH
Deputy Clerk

ATTEST: A TRUE COPY
JACK BRONKEMA, CLERK

APPEALS COURT OPINION

STATE OF MICHIGAN
COURT OF APPEALS

OCT 19 1976

ESTHER V. KRUEGER,
Plaintiff-Appellee,

v

No. 23980

ALICE J. WILLIAMS,
Defendant-Appellant.

Before: R. B. Burns, P. J., and M. J. Kelly and Hughes, JJ.
M. J. Kelly, J.

On March 4, 1974, plaintiff filed a complaint in the circuit court of Kent County for damages allegedly resulting from an

automobile collision occurring on May 7, 1971. In compliance with Michigan's Non Resident Motorist Statute,[1] plaintiff on July 11, 1974, served the summons and complaint on the Secretary of State and by registered mail to defendant's last known address. The summons and complaint were returned on July 17, 1974 to the plaintiff marked "moved — left no address."

On July 24, 1974, plaintiff mailed a copy of the summons and complaint to defendant's liability insurer, Detroit Automobile Inter-Insurance Exchange (hereinafter referred to as D.A.I.E.). A special appearance, answer and motion for accelerated judgment were entered by defendant's attorney on August 9, 1974 challenging the court's jurisdiction and raising the statute of limitations as a bar to the action. On September 13, 1974, pursuant to GCR 1963, 105.8, plaintiff filed a motion for substitute service on the defendant by serving D.A.I.E. Three hearings were subsequently heard on these motions. On April 4, 1975, defendant filed a motion to mandamus the clerk to dismiss the complaint in accordance with GCR 1963, 102.5. At the last hearing, defendant's motion for mandamus was granted and plaintiff's motion for

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[1]MCLA 257.403; MSA 9.2103

"§9.2103 Service of process in civil actions on nonresident operator or owner of motor vehicle; secretary of state as attorney; appointment not revoked or action not abated by death; taxable costs against plaintiff; applicability of section.] Sec. 403. (a) Service of summons in any action against a person, who at the time of such service is a nonresident of this state, growing out of any accident or collision in which such person may have been involved while operating a motor vehicle upon a public highway of this state or in which a motor vehicle owned by him may have been involved while being operated with his consent, express or implied, on such public high-

(continued on next page)

substitute service denied. It does not appear that the trial judge ruled on the motion for accelerated judgment. Plaintiff appeals these orders as a matter of right claiming that the trial court abused its discretion in denying her motion for substitute service.

We hold that the trial court did not have jurisdiction over defendant and that 180 days having passed was compelled to dismiss the complaint.

In Michigan, suit is commenced for the purpose of the running of the statute of limitations upon the filing of the complaint. *Buscaino* v *Rhodes*, 385 Mich 474; 189 NW2d 202 (1971). It is undisputed that plaintiff commenced her action well within the statutory period.[2] GCR 1963, 102.5 provides that a plaintiff has 180 days from the filing of the complaint in which to serve a defendant. If the defendant is not served within 180 days, the clerk is obliged to dismiss the complaint. However, our Supreme Court has held that the rule is not self-executing and that if a defendant is personally served before the clerk dismisses the complaint, the action is viable even if more than 180 days have passed since its commencement. *Goniwicha* v *Harkai*, 393 Mich 255; 224 NW2d 284 (1974).

(continued from previous page)

way, may be made upon the secretary of state as the true and lawful attorney of such person with the same legal force as if served on him personally within this state. Service of such summons shall be made by leaving a copy thereof with the secretary of state, or his deputy, who shall keep a record of each such process and the day and hour of service, and such service shall be sufficient service upon such nonresident, provided that notice of such service and a copy of the summons are forthwith either served upon the defendant personally by the sheriff or constable of the county in which he resides or sent by registered mail by the plaintiff or his attorney to the defendant. If personal service of such notice and copy of summons [is] had upon

(continued on next page)

GCR 1963, 102.5(1) provides:

".5 Dismissal of Action, Defendants not served. Every action shall be dismissed, without prejudice, as to any defendant in the action who has not been served with process personally, by substituted service or by publication within 180 days from the date of the filing of the first complaint in the action with the court unless that defendant has filed any pleading in the action within that period of time, in which event, the action shall not be dismissed as to that defendant. [Amended April 3, 1972, effective July 1, 1972; further amended Oct. 24, 1972, immediate effect.]

"(1) Upon the expiration of 180 days from the date of the filing of the first complaint in the action with the court, the clerk of the court in which the complaint was filed shall examine the court records in the action and, if he determines that any defendant in the action has not been served with process within that period of time, he shall automatically enter an order of dismissal as to that defendant as provided above. This sub-rule shall not

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(continued from previous page)

the defendant the officer making the service shall so certify in his return which shall be filed with the court having jurisdiction of said cause, or if service be made by registered mail then the plaintiff or his attorney shall make an affidavit showing that he has made service of the notice of summons upon the defendant by registered mail as herein provided and the affiant shall attach thereto a true copy of the summons and notice so served and the registry receipt of the defendant and shall file the affidavit and attached papers with the court having jurisdiction of [the] cause. The court in which the action is pending may order such extension of time as may be necessary to afford the defendant reasonable opportunity to defend the action. ***

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[1]MCLA 600.5805(7); MSA 27A.5805(7)

apply if that defendant has filed any pleading in the action within that period of time. [Amended April 3, 1972, effective July 1, 1972; further amended Oct. 24, 1972, immediate effect.]"

It is undisputed that defendant has not been served personally. Additionally, she has not been served by substitute service. The Non-Resident Motorist Statute sets out the procedure for substitute service,[3] and requires actual notice of the pendency of the action before jurisdiction is acquired over the defendant. *Tomkiw* v *Sauceda,* 374 Mich 381, 386; 132 NW2d 125,128 (1965), *Melville* v *Kelleher,* 22 Mich App 251, 256; 177 NW2d 238, 240 (1970). The return of the registered letter shows an invalid service. *Tomkiw* v *Sauceda, supra.* The copy mailed to D.A.I.E. is not service of process. There is no statute or court rule authorizing such a procedure. Plaintiff attempted later to utilize GCR 1963, 105.8 to legitimize such service. GCR 1963, 105.8 states as follows:

"Rule 105.8 Discretion of the Court.

"The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules."

The rule requires a court order prior to the service. Technical defects in service of process may be cured by amendment so as not to render the service void. *Barber* v *Tuohy,* 33 Mich App 169; 189 NW2d 722 (1971), see also *Fulton* v *Citizens*

[3]MCLA 257.403; MSA 9.2103, reprinted *supra.*

Mutual Ins Co, 62 Mich App 600; 233 NW2d 820 (1975). However, this Court has expressed the view that GCR 105.8 requires strict compliance. *Felix* v *Felix,* 47 Mich App 744; 209 NW2d 871 (1973), *Conrad* v *Ward,* 33 Mich App 687; 190 NW2d 361 (1971). A court order is a condition precedent to the utilization of GCR 105.8, see *Felix* v *Felix, supra.* At the time of the service on D.A.I.E. plaintiff did not have a court order and therefore did not obtain service on defendant.

Plaintiff claims that although defendant was not personally served that defendant filed a pleading and therefore the complaint is not subject to dismissal. Defendant filed a special appearance for the very purpose of claiming a jurisdictional defect due to the lack of service of process. To hold that a defendant waives the very defect that he is claiming would be ludicrous to say the least. We find that defendant's special appearance and motion do not constitute a pleading and approve the following analysis.

> "Even if process has not been served within 180 days, the action is not dismissed under the amended rule if the defendant has 'filed any pleading,' thereby having submitted to the jurisdiction of the court. What if the defendant has not filed a pleading, but has filed a motion for accelerated judgment or a motion for summary judgment under Rules 116 or 117? For other purposes under the rules, such motions are not considered to be pleadings. (For example, plaintiff's right to amend his complaint as a matter of course, up to 15 days after a responsive pleading is served, is not affected by the filing of a motion for accelerated judgment or a motion for summary judgment.) However, the filing of such a motion does waive the defense of lack of jurisdiction over the person, unless that defense is included in the motion. Sub-rule 116.2. It would not make much sense to con-

strue sub-rule 102.5 as requiring dismissal for lack of service of process after defendant has waived any defense based on lack of jurisdiction over him. Therefore, a motion under Rules 116 or 117, except the motion to quash or dismiss under sub-rule 116.1(1), should probably be considered a 'pleading' for the purpose of avoiding a dismissal under sub-rule 102.5." 1 Honigman & Hawkins, Michigan Court Rules Annotated, (2d ed), 1975 Supp, pp 12-13.

The 180 days had expired on September 3, 1974. Plaintiff filed her motion for substitute service on September 13, 1974. At the time that defendant's motion for accelerated judgment and plaintiff's motion for substitute service were heard, the court was without jurisdiction over the person of defendant. This distinguishes *Goniwicha*. There, the court had jurisdiction over the defendant and could thus proceed. Here, had the court taken the motions in order of their filing, it would have been compelled to rule on defendant's motion for accelerated judgment first and certainly dismissal would follow. *Jackson City Bank & Trust Co* v *Fredrick*, 271 Mich 538, 544; 260 NW 908, (1935), *Heikkinen* v *Hovinen*, 7 Mich App 541; 152 NW2d 163 (1967). Plaintiff's motion was untimely. We do not speculate as to the outcome had plaintiff filed a motion for substituted service prior to the expiration of 180 days.

Although the trial court did not expressly rule on defendant's motion for accelerated judgment this Court may now do so.[4] We grant the motion and affirm the dismissal of the complaint.

Costs to defendant.

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[4]GCR 1963, 820.1(7)

ORDER GRANTING REHEARING

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 21st day of December in the year of our Lord one thousand nine hundred and seventy-six.

ESTHER V. KRUEGER,
Plaintiff-Appellant,

v

ALICE J. WILLIAMS,
Defendant-Appellee.

No. 23980
L. Ct. No.
74 15502 N1

Present the Honorable Robert B. Burns, Presiding Judge
Michael J. Kelly, Sam Street Hughes, Judges

In this cause an application for rehearing is filed by plaintiff-appellant, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court;

IT IS ORDERED that the application for rehearing be, and the same is hereby GRANTED.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 21st day of December in the year of our Lord one thousand nine hundred and seventy-six.

/s/ Ronald L. Dzierbicki
Clerk

APPEALS COURT OPINION (ON REHEARING)

STATE OF MICHIGAN
COURT OF APPEALS

APR 18 1977

ESTHER V. KRUEGER,
Plaintiff-Appellee,

v

No. 23980

ALICE J. WILLIAMS,
Defendant-Appellant.

Before: R. B. Burns, P.J., and M. J. Kelly and Hughes, JJ.
M. J. Kelly, J. (On rehearing)

We granted rehearing in this matter to correct an erroneous statement made in our earlier decision. 71 Mich App 638; NW2d (1976). The issue involved was whether the trial court abused its discretion in denying plantiff's motion for substituted service.

As part of our holding in that decision we stated the following:

"Here, had the court taken the motions in order of their filing, it would have been compelled to rule on defendant's motion for accelerated judgment first and certainly dismissal would follow. *Jackson City Bank & Trust Co* v *Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935), *Heikkinen* v *Hovinen*, 7 Mich App 541; 152 NW2d 163 (1967). Plaintiff's motion was untimely. We do not speculate as to the outcome had plaintiff filed a motion for substituted service prior to the expiration of 180 days.

"Although the trial court did not expressly rule on defendant's motion for accelerated judgment this Court may now do so. We grant the motion and affirm the dismissal of the complaint." 71 Mich App 638, 644-645 (footnote omitted).

We were in error in implying that the trial court need have taken the motions in the order of their filing. Instead motions are generally heard in the order in which they are noticed for hearing. *Forest* v *Parmalee*, (on rehearing), 60 Mich 401, 406; 231 NW2d 378 (1975). However the fact is that the plaintiff's motion for substituted service was properly called for hearing prior to defendant's motion for summary judgment [and prior to defendant's motion for mandamus to order the clerk to dismiss plaintiff's cause of action on the ground that 180 days had passed].

Under the rule of *Goniwicha* v *Harkai*, 393 Mich 255; 224 NW2d 284 (1974), the 180-day rule is not self-executing. Plaintiff's complaint was pending until dismissed by order of the clerk or the circuit court. If the trial court had granted plaintiff's motion for substituted service on its merits, then it could have directed a service of process in accordance with GCR 1963, 105.8

We now reach the issue that we failed to reach before. Plaintiff urges that the trial court abused its discretion in not granting her motion for substituted service on the defendant's insurance company under GCR 1963, 105.8

The trial court ruled that substituted service on the defendant's insurance company was not "reasonably calculated to give her actual notice of the proceedings and an opportunity to be heard." The committee comments on this court rule are as follows:

> "This provision is included to give the court discretion to allow service of process to be made in a manner which satisfies the language of *Milliken* v *Meyer*, 311 U.S. 457, 61 S.Ct.339, 85 L. Ed. 1143 (1940), *i.e.*, a method 'reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard.'
>
> "The state of the law seldom remains static for very long, and particularly in the field of service of process, change has been occurring rapidly. Methods of service of process which were absolutely opposed and rejected a few decades ago have now been given the stamp of acceptability by judicial approval and legislative enactment. *It is thus believed desirable to confer discretion upon the courts to permit utilization of new methods of service of process which may be developed, and to permit courts themselves to propose and effectuate other methods of service of process,* so long as the methods meet the requirements of the due process clause of the 14th Amendment to the United States Constitution, and the equivalent clause in the Michigan Constitution.
>
> "In addition, cases may arise which have not been foreseen or provided for in the proposed revision, and this omnibus subsection, permitting the exercise of judi-

cial discretion, will permit service of process to be accomplished without the necessity of enacting amendatory legislation or rules. Foresight and vision as aides to scope of human thinking, and no litigant should be penalized because of the lack of a method of accomplishing the formality of service of process. Therefore it is desirable to include the instant provision as a matter of policy." (Emphasis added).

In *Felix* v *Felix*, 47 Mich App 744; 209 NW2d 871 (1973) we held that the method of service authorized under GCR 1963, 105.8 must be "reasonably calculated to give the defendant an actual notice of the proceedings and an opportunity to be heard." In the case at bar, an affidavit was filed regarding attempted service on defendant Alice J. Williams at Route 2, Box 165A, Hope, Arkansas. A registered letter was sent to that address under MSA 9.2103 and that registered letter was returned unopened, marked, "moved-left no address." The plaintiffs produced the defendant insurer's underwriting file and proofs were taken in open court to the effect that the last correspondence between the insurance company and the defendant was in July of 1971 at a local Grand Rapids address. There was no contact between the insurance company and the defendant subsequent to that time and after arguments and testimony the trial court held:

"The testimony we have received here makes it clear that the agents and employees of the insurance company have not had any contact with the defendant, Alice J. Williams since 1971; do not know of her whereabouts; and it is clear that service upon the insurance company would not be reasonably calculated to give actual notice to Alice J. Williams.

"Therefore the motion for substituted service upon the insurance company is denied."

We find no abuse of discretion in this ruling. It appears that plaintiff's representatives made diligent efforts to locate the defendant but said efforts were unrewarded. Were we to order substituted service on the insurance company under the record presented here, we would be ignoring the very strong indication that substituted service would be unlikely to give defendant actual notice of the proceedings and an opportunity to be heard.

Affirmed. No costs.

ORDER GRANTING LEAVE TO APPEAL

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of July in the year of our Lord one thousand nine hundred and seventy-nine.

CR20-107

ESTHER V. KRUEGER,
Plaintiff-Appellant,

v 59743 COA: 23980
LC: 74-15502-NI

ALICE J. WILLIAMS,
Defendant-Appellee.

Present the Honorable MARY S. COLEMAN, Chief Justice, THOMAS GILES KAVANAGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices

Order Granting Leave to Appeal

On order of the Court, the application for leave to appeal is considered, and it is GRANTED. The parties are directed to include among the issues to be briefed whether the trial court erred by refusing to allow plaintiff substituted service of process upon the defendant's liability insurer?

It is further ORDERED that this case be argued and submitted to the Court together with the cases of *Rodgers* v *Davis* (Docket No. 61861) and *Moyer* v *Lott* (Docket No. 62177), one immediately following the other, at such future session of the Court as both cases are ready for submission for decision.

The clerk is directed to place this case on the January 1980 session calendar. The briefs and appendixes of the parties are to be filed and served in the manner provided by GCR 1963, 857, but the appellant's brief and appendix must be filed and served by September 28, 1979, and the appellee's brief, and appendix if necessary, by December 14, 1979.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 19th day of July in the year of our Lord one thousand nine hundred and seventy-nine.

Corbin R. Davis, Deputy Clerk

AMENDMENT TO ORDER

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 3rd day of August in the year of our Lord one thousand nine hundred and seventy-nine.

ESTHER V. KRUEGER,
Plaintiff-Appellant,

v 59743

CoA: #23980

LC: #74-15502-NI

ALICE J. WILLIAMS,
Defendant-Appellee.

Present the Honorable MARY S. COLEMAN, Chief Justice, THOMAS GILES KAVANAGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices

AMENDMENT TO ORDER

On order of the Court, the order of July 19, 1979 is hereby amended to correct a clerical error in the filing deadlines set forth therein by correcting the third paragraph of the text thereof to read as follows:

The Clerk is directed to place this case on the January 1980 session calendar. The briefs and appendixes of the parties are to be filed and served in the manner provided by GCR 1963, 857, but the appellant's brief and appendix must be filed and served by October 8, 1979, and the appellee's brief and appendix if necessary, by December 3, 1979.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of August in the year of our Lord one thousand nine hundred and seventy-nine.

Corbin R. Davis, Deputy Clerk

SUPREME COURT OPINION

(Filed February 3, 1981)

STATE OF MICHIGAN
SUPREME COURT

ESTHER V. KRUEGER,
Plaintiff-Appellant,

v

No. 59743

ALICE J. WILLIAMS,
Defendant-Appellee.

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs-Appellees,

v

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants-Appellees,

No. 61861

v

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant-Appellant.

BEFORE THE ENTIRE BENCH

FITZGERALD, J.

We are asked to construe GCR 1963, 105.8. In the *Krueger* case, we must decide whether the rule will permit substituted service of process upon a defendant's liability insurer. In the *Rodgers* case, we must determine if this rule authorizes service of process by publication to obtain personal jurisdiction over a defendant.

I

In *Krueger* v *Williams*, plaintiff and defendant were involved in an automobile accident. At the time, both parties were

insured by the Detroit Automobile Inter-Insurance Exchange (hereafter DAIIE). Plaintiff attempted to negotiate a settlement with DAIIE. When resolution became impossible, approximately six months before the statute of limitations was to run, plaintiff filed suit against Alice Williams, who at the time of the accident was apparently a resident of Grand Rapids.

After the complaint was filed, plaintiff tried to locate the defendant. An investigator was hired but all attempts to find Alice Williams were unsuccessful.

Four months after the complaint was filed, a copy of the summons and complaint were sent by registered mail, return receipt requested, to the defendant's last known address in Arkansas. These were return unopened with the notation "Moved — left no address." Copies were also served upon the Secretary of State, Non-Resident Section, and defendant's liability insurance carrier. The summons, complaint, affidavit and proof of service were mailed to the DAIIE office in Grand Rapids. The attorney for the insurance company entered a special appearance, challenging the circuit court's jurisdiction since no personal service was made on Alice Williams.

Plaintiff then filed a motion pursuant to GCR 1963, 105.8, to allow substituted service upon defendant by service of process on the liability carrier. Following hearings on the motion, this form of substituted service was denied. The circuit court also granted defendant's application for a writ of mandamus dismissing the cause of action. The Court of Appeals agreed that the method of substituted service was inadequate. We granted leave to appeal, directing the parties to address the issue of whether the trial court erred by refusing to allow plaintiff substituted service of process upon the defendant's liability insurer.

In *Rodgers,* plaintiffs were passengers on a city bus when a police car chasing a vehicle went through a stop sign and collided with the bus. The plaintiffs sustained injuries and filed a complaint naming various officials as defendants and alleging that the driver and/or owner of the car was unknown. After the plaintiffs learned that the owners of the automobile were Fanny Mae and Willie Davis, and that the driver was either Louis Scott or Paul Hines, a motion was made and granted to amend the complaint and add these four persons as defendants. Shortly thereafter, plaintiffs filed a motion for substituted service by mail and publication stating that following diligent attempts by their office staff and outside investigative agencies, they had been unable to locate the added defendants.[1] This motion was granted.[2] The added defendants failed to appear and a default judgment was entered against Fanny Mae Davis, Willie Davis, Louis Scott and Paul Hines.

Plaintiffs then filed an affidavit for garnishment against the Detroit Automobile Inter-Insurance Exchange which had a policy of insurance in effect on the named insured Willie Davis and on Louis Scott. DAIIE moved to vacate the default and dismiss the garnishment on the grounds that personal jurisdiction was never obtained over the principal added defendants and that the order for substituted service was im-

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[1] Fanny Mae Davis' last known address was in Clarksville, Tennessee. Louis Scott was on parole at the time to the Michigan State Department of Corrections; however, he hadn't reported to his parole officer for a substantial period of time, and his parole officer did not know his current whereabouts. Plaintiffs had no knowledge of the whereabouts of defendants Hines and Willie Davis.

[2] Letters were sent by registered mail to Fanny Mae Davis' last known address. A notice was published in the *Detroit Legal News* once a week for five weeks naming all defendants involved in this cause of action.

properly granted because it was not calculated to give actual notice of the proceedings. This motion was denied.

The trial of garnishee liability resulted in judgment for the plaintiffs. The court found that the insurance company had adequate notice of the case well before the default judgment was taken and had failed to sustain the burden of proving that it was prejudiced. The Court of Appeals affirmed in an unpublished per curiam opinion.[3] Rehearing in the Court of Appeals was denied. We granted leave to appeal, directing the parties to include among the issues to be briefed whether the trial court erred in finding that GCR 1963, 105.8, authorizes service of process by publication to obtain personal jurisdiction as a means reasonably calculated to give actual notice of the proceedings and an opportunity to be heard and whether the trial court, when considering the prerequisites for substituted service when personal jurisdiction is required, erred by not requiring an appropriate affidavit in support to show diligent inquiry.

II

GCR 1963, 105.8 reads:

> "Discretion of the Court. The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual

[3] The Court of Appeals agreed that DAIIE had adequate notice of the pending action sufficiently before the default judgment was entered. In regard to the substituted service by mail and publication, the court noted that the evidence indicated that the added defendants had purposefully concealed their whereabouts. In such a situation it would be unfair to allow the garnishee to escape liability when the judgments are within the policy limits and the garnishee is the truly interested party. Thus, service under GCR 1963, 105.8, was

(continued on next page)

notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules."

Service of process is defined as:

"[T]he giving of such actual or constructive notice of a suit or other legal proceeding to defendant as makes him a party thereto, and compels him to appear or suffer judgment by default; and 'service' in this connection means the execution of process or the particular act of the officer by which the copy of the citation was communicated." 72 CJS, Process, § 25, pp 1022-1023.

Service may be made personally on a defendant or, if this is not possible, constructive service is permitted. Our court rules provide various methods to achieve substituted service. The Legislature has recognized that these rules must be drawn so as to be applicable to a wide variety of facts. The inherent limit is the requirement that the means chosen be reasonably expected to give notice of the pendency of the action. GCR 1963, 105.8, recognizes this by allowing service in any manner as long as it can be shown to the court that other, more traditional, modes are unavailable.

(continued from previous page)

appropriate. The court held, however, that service on Fanny Mae Davis was not proper since there was no evidence that a return receipt of the registered mail was made a part of the record as required by statute. MCL 257.403; MSA 9.2103. Thus, judgment against Fanny Mae Davis was vacated. The default judgment against Willie Davis, Louis Scott and Paul Hines was affirmed, as was the judgment of garnishment against DAIIE.

The committee notes to rule 105.8 read:

"This provision is included to give the court discretion to allow service of process to be made in a manner which satisfies the language of *Milliken* v *Meyer*, 311 US 457; 61 S Ct 339; 85 L Ed 278; 132 ALR 1357 [1940], rehearing denied 312 US 712; 61 S Ct 548; 85 L Ed 1143 [1941], *i.e.*, a method 'reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard.'

"The state of the law seldom remains static for very long, and particularly in the field of service of process, change has been occurring rapidly.*** It is thus believed desirable to confer discretion upon the courts to permit utilization of new methods of service of process which may be developed, and to permit courts themselves to propose and effectuate other methods of service of process, so long as the methods meet the requirements of the due process clause of the 14th Amendment to the United States Constitution, and the equivalent clause in the Michigan constitution." 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), pp 111-112.

Traditionally, service of process was integrally linked with jurisdiction and the power of a court to render a binding decision. See *Pennoyer* v *Neff*, 95 US 714; 24 L Ed 565 (1877). This "power concept" has been substantially altered by the United States Supreme Court decision in *Shaffer* v *Heitner*, 433 US 186; 97 S Ct 2569; 53 L Ed 2d 683 (1977). Jurisdiction and notice may now be viewed as two separate aspects of one due-process guarantee. *Shaffer* addressed itself to the jurisdiction question, reaffirming the basic requirements set out in *International Shoe Co* v *Washington*, 326 US 310; 66 S Ct 154; 90 L Ed 95 (1945). To assert jurisdiction sufficient minimum contacts must exist between the forum, the defendant and the

subject matter of the litigation so as not to offend traditional notions of fair play and justice.

The notice component, equally fundamental to any due process analysis, but with its own distinct requirements, is guided by the reasoning set forth in *Mullane* v *Central Hanover Bank & Trust Co,* 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950). See also Lacy, *Personal Jurisdiction and Service of Summons After Shaffer* v *Heitner,* 57 Oregon L Rev 505, 506-511 (1978).

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane, supra,* p 313.

The requirement of notice so as to afford an opportunity to be heard is clearly the heart of GCR 105.8. The rule adopts a liberal approach to service of process which recognizes the mobility of contemporary society and the state's interest in providing recompense for injured plaintiffs. The court is given the discretion to implement any method for service of process beyond those set out in other rules when it is shown that in the context of a given situation other methods are not reasonable. This omnibus rule is meant to allow flexibility, and as long as the means chosen meet *Mullane's* standards, service will be allowed. See *Conrad* v *Ward,* 33 Mich App 687, 690; 190 NW2d 361 (1971); *Felix* v *Felix,* 47 Mich App 744; 209 NW2d 871 (1973).

It is important to note that *Mullane* acknowledged the possibility that the means chosen would never reach the defendant.

> "[I]t has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the

situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane, supra,* p. 317.

This language reflects an awareness that there may be situations in which an injured plaintiff will not be denied a cause of action even though a defendant cannot be found. Similarly, the broad scope of GCR 1963, 105.8, offers an injured plaintiff the possibility of fashioning a method of service which will serve to permit an action to proceed. The rule recognizes that substituted service in an extraordinary case is not an automatic right. After consideration of all the relevant circumstances of the individual case, it is the court that must make an independent evaluation regarding available alternative methods of service consistent with the guarantees of due process. As long as the means are "reasonably calculated" to reach the defendant, the requirement of actual notice is satisfied and service will be sustained. We are reminded of the frequently quoted words of Justice Holmes, "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances, no doubt justice will be done." *Blinn* v *Nelson,* 222 US 1, 7; 32 S Ct 1; 56 L Ed 65 (1911).

III

The arguments in the *Krueger* case involve two issues: 1) will service of process upon a defendant's liability insurer comport with the guarantees of due process of law and enable our courts to exercise jurisdiction, and 2) did the lower courts err by not allowing plaintiff to use some method of substituted service of process to serve an absent defendant.

We conclude that jurisdiction was proper in Michigan courts and that litigation here does not offend the due process rights of defendants. Defendant Williams argues:

> "The landmark case of *Pennoyer* v *Neff* [*supra*] declared that, to have a determination of personal liability of the defendant, he must be brought within the jurisdiction of the court by service of process within the state, or by his voluntary appearance.*** In other words, while the court might have jurisdiction over the subject matter, it would not have jurisdiction over the defendant unless he was personally served with process within the state."

We rely again on the United States Supreme Court's recent decision of *Shaffer* v *Heitner*, in which the Court said, "*Pennoyer* itself recognized that its rigid categories*** could not accommodate some necessary litigation." *Shaffer, supra*, p 201. Cases involving automobile accidents comprised one such category.

> "The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to *in personam* actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power. This modification, like the accommodation to the realities of interstate corporate activities, was accomplished by use of a legal fiction that left the conceptual structure established in *Pennoyer* theoretically unaltered." *Shaffer, supra*, p 202.

Thus, under *Pennoyer*, service could be made on an in-state resident as the basis of in personam jurisdiction and, by using the legal fiction that the out-of-state motorist appointed a state official to act as his agent and accept process, in personam jurisdiction was also possible for the non-resident driver.

International Shoe Co v *Washington, supra*, acknowledged this use of legal fictions and announced that the ancient concept of in personam jurisdiction based on the court's power over the defendant was no longer the proper focus of inquiry. Rather,

courts were to evaluate the contacts that existed between the defendant and the forum and if sufficient contacts were shown to exist, jurisdiction could be maintained. The standard to be used was one of reasonableness under all of the circumstances; no mechanical formulas could determine whether or not due process was satisfied. The *Shaffer* Court said, "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer, supra,* p 204.

Our courts have utilized this minimum contact approach. See *Parish* v *Mertes,* 84 Mich App 336; 269 NW2d 591 (1978); *Cole* v *Doe,* 77 Mich App 138; 258 NW2d 165 (1977). The language of our court rules reflects these concepts. GCR 1963, 105.9, Personal Jurisdiction, speaks of the contacts, ties and relations between the defendant and the state as the tests to determine whether our courts may assert personal jurisdiction. In *Schneider* v *Linkfield,* 40 Mich App 131; 198 NW2d 834 (1972), *aff'd* 389 Mich 608; 209 NW2d 225 (1973), the Court of Appeals, addressing the jurisdiction issue and not the validity of service, said, "We see nothing unfair about allowing a plaintiff to sue in Michigan a defendant who was a resident of the jurisdiction at the time the cause of action arose." In *Schneider,* an automobile accident occurred in Michigan. The defendants were Michigan residents at the time of the accident but had subsequently moved out of state.

Recent United States Supreme Court decisions have questioned the validity of the *Pennoyer* type of reasoning in favor of the dual aspect analysis we have explored in Part II. We conclude that Alice Williams did have sufficient contacts with Michigan to make our courts a proper forum for litigation.

In addressing the issue of substituted service of process, we conclude that the lower courts did err by not allowing, consistent with the provisions of GCR 1963, 105.8, some form of substituted service of process.

Some additional facts are pertinent. On the date of the accident, both parties were insured by DAIIE. Alice Williams was an assigned risk. Thus, though DAIIE did not sell the policy to Mrs. Williams, and while the actual notice of the accident was forwarded by the "Producer of Record" (the producing agent who sold the policy to Alice Williams), DAIIE did have an obligation to the defendant. The parties do state that at one point, albeit early in the history of this case, the defendant did write a letter to the insurance company. Also, plaintiff did attempt to negotiate this claim with a representative of DAIIE. Suit was filed only after these negotiations failed.

Plaintiff attempted service of process by compliance with the non-resident motorist statute, MCL 257.403; MSA 9.2103. Because the letter was returned unopened, this type of service was unavailable. See *Tomkiw* v *Sauceda*, 374 Mich 381; 132 NW2d 125 (1965).

Plaintiff made diligent efforts to locate the defendant. An investigator was hired and various locations checked. Affidavits of two investigators as well as plaintiff's attorney were filed reflecting these efforts. Plaintiff has demonstrated that there were no other means available to her to effect service of process except by appealing to the court, in its discretion, to allow her to serve the defendant's liability insurer.

While the ability to effect service of process in this manner is a new concept for Michigan, we are not without precedent. A unanimous opinion of the highest court of New Jersey has held that consistent with the requirements of due process,

service of process on a motorist, insured at the time of the accident but missing at the time of suit, may be made by service on the defendant's liability insurance carrier and notice to the defendant's last known address. *Feuchtbaum* v *Constantini*, 59 NJ 167; 280 A2d 161 (1971).

In *Dobkin* v *Chapman*, 21 NY2d 490; 289 NYS2d 161; 236 NE2d 451 (1968), the New York Court ruled that following an automobile accident when the whereabouts of the defendant is unknown, alternative methods of service of process may be used, including service by ordinary mail or service by mail and service on the insurance carrier. After noting that due process cannot be measured by any rigid formula, the New York Court evaluated four factors before reaching its conclusion. Weighing "the plaintiff's need, the public interest, the reasonableness of the plaintiff's efforts under all the circumstances to inform the defendant, and the availability of other safeguards for the defendant's interests", the Court concluded that the interests of the plaintiffs are paramount.

After considering the same factors, the New Jersey Court wrote:

> "Upon a consideration of all of the interests involved, the balance must be struck in plaintiff's favor. Substituted service should be ordered. We agree that service upon the carrier would be appropriate. By its contract the carrier has the right and the duty to defend any action against the insured. The carrier thus has a representative role, which, though it does not include an express agency to accept service of process, is nonetheless relevant when process cannot otherwise be served upon the insured. Realistically there is more of a chance that defendant will learn of the suit by such service than

through available alternatives, for the carrier is likely to have an interest in finding him." *Feuchtbaum, supra,* p. 178.

We agree with these analyses. Plaintiff has made diligent attempts to serve defendant. Plaintiff's need to utilize constructive service in this case is obvious. Our mobile society affords elusive defendants the potential to escape liability by avoiding service of process. The insurance company, while undertaking negotiations to settle this controversy, was aware of the possibility that a suit would be filed. We would allow constructive service under these circumstances.

In *Rodgers,* the second case before us, appellant DAIIE contests both the type of service which was allowed and the manner in which the substituted service was granted. It argues that to premise personal jurisdiction on service of process by publication alone is violative of the constitutional guarantee of a due-process right to notice. Appellant also contends that where personal jurisdiction is necessary, GCR 1963, 105.8, requires an appropriate affidavit of facts showing the diligent inquiry made by plaintiffs to locate defendants.

The method of imparting notice sufficient to pass constitutional muster was discussed by the United States Supreme Court in *Mullane:*

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections.
>
> * * *
>
> "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt

to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, *or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.*" (Emphasis added.) (Citations omitted.) *Mullane, supra,* 314-315.

It is evident that due process does not require that actual notice be given in every case. Due process requirements are satisfied if the method of imparting notice is reasonably calculated under all the circumstances to afford notice. When circumstances make it doubtful that actual notice will be effected, the method used may not be substantially less likely to afford notice than other customary substitutes.

Service of process by publication is generally regarded as the method least likely to impart actual notice. However, publication notice is permissible under the Due Process Clause in certain limited situations. As we have quoted, the *Mullane* Court recognized that if, for example, the specific whereabouts of a person is unknown, service of process by publication may be the most practicable and adequate method of service available.

Notice must be reasonably calculated to inform interested parties that an action against them is pending, but there is no rigid formula to determine when personal service is required or when constructive service may be utilized. The kind of notice required will, of necessity, vary with the circumstances of each case. See *Walker* v *City of Hutchinson,* 352 US 112; 77 S Ct 200; 1 L Ed 2d 178 (1956).

In a number of cases subsequent to *Mullane,* the Supreme Court was confronted with the issue of whether service of

process by publication constituted fair notice to a defendant consistent with due process. It is significant that in every instance where alternate means of giving notice were available which were better calculated to give actual notice, the Court held service of process by publication constitutionally deficient.[4]

The *Hutchinson* Court rejected service of process by publication as an adequate method of imparting notice in that case, stating that "*if feasible*, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests". (Emphasis added.) *Id.*, 115. Thus, although the United States Supreme Court has not set forth a rigid test as to what showing is required before publication notice is deemed sufficient, the Court has not hesitated to disapprove the use of publication notice where alternative means better calculated to impart actual notice are reasonably available and where resort to these alternate means is not overly burdensome.

---

[4] See, *e.g.*, *City of New York* v *New York, N H & H R Co*, 344 US 293, 296; 73 S Ct 299; 97 L Ed 333 (1953), which involved a railroad reorganization proceeding where publication notice to a creditor of the time for filing claims was held insufficient. In *Walker* v *City of Hutchinson*, 352 US 112; 77 S Ct 200; 1 L Ed 2d 178 (1956), publication notice to a landowner of condemnation proceedings was deemed constitutionally deficient where the landowner's name was known to the city and the city failed to present any "compelling or even persuasive reasons why *** direct notice *** [could not] be given." Id, 116.

Similarly, in *Schroeder* v *City of New York*. 371 US 208; 83 S Ct 279; 9 L Ed 2d 255 (1962), publication notice to a landowner whose property rights were affected by diversion of a river was held insufficient. The Court noted that the landowner's name and address were ascertainable from deed records and tax rolls and concluded:

(continued on next page)

Similarly, our Court has held unconstitutional statutory schemes which authorize service by publication as the only required means of imparting notice especially where the identity and whereabouts of parties are readily ascertainable. See *Dow* v *Michigan*, 396 Mich 192; 240 NW2d 450 (1976); *Ridenour* v *Bay County*, 366 Mich 225; 114 NW2d 172 (1962).

GCR 1963, 105.8 was designed to give trial judges freedom to fashion methods of giving notice consistent with due process, where a sufficient showing has been made to justify relieving a party from compliance with methods of service specifically prescribed by court rule or statute. A party seeking such relief must show to the court's satisfaction that the proposed method of service "is reasonably calculated to give him [defendant] actual notice of the proceedings" and that "service of process cannot reasonably be made in the manner provided for under other rules". GCR 1963, 105.8.

(continued from previous page)

> "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder*, 212-213.

In other cases concerning the adequacy of notice, the Court has stressed that notice will not be considered reasonable if better means of actually informing a party are available. Thus, in *Covey* v *Town of Somers*, 351 US 141; 76 S Ct 724; 100 L Ed 1021 (1956), the Court held that mailed notice in a foreclosure proceeding was insufficient where the city knew that the party receiving the notice was incompetent and therefore incapable of understanding the meaning of the notice. Also, in *Robinson* v *Hanrahan*, 409 US 38; 93 S Ct 30; 34 L Ed 2d 47 (1972), notice was held insufficient where notice was mailed to defendant's home address and the state knew that defendant was no longer at that address but was incarcerated.

A truly diligent search for an absentee defendant is absolutely necessary to supply a fair foundation for and legitimacy to the ordering of substituted service. "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane, supra,* 315.

The verified motion for substituted service presented on behalf of plaintiffs in *Rodgers* is insufficient. It fails to show with particularity either that service of process could not reasonably have been made according to prescribed methods or that no better alternative means of giving notice were available than publication.

The only evidence in the record of plaintiff's efforts to personally serve defendants appears in a conclusory statement contained in plaintiff's motion for substituted service supported by a general affidavit by one of their attorneys that the motion's allegations are "true to the best of his knowledge, except those matters therein stated to be on information and belief, and as to those matters he believes the same to be true". In short, there is no direct sworn testimony.[5]

The motion first asserts that personal service on defendants "is not possible". It then states the last known address of one defendant and that the whereabouts of the other defendants

---

[5] Such testimony as there is is contained in the following three paragraphs:

"1. Plaintiffs petition this Honorable Court to serve the defendants, Fanny Mae Davis, Willie Davis, Louis Scott and Paul Hines by substituted service to their last known addresses as may be reasonably determined by plaintiffs for the reason that plaintiffs have sought to serve defendants, Fanny Mae Davis, Louis Scott, Willie Davis and Paul Hines personally, but same is not possible.

(continued on next page)

are "unknown". The motion further alleges that despite "diligent attempts" by office staff and investigative agencies, plaintiffs have been unable to locate defendants. In short, the pleadings contain insufficient factual assertions as to what diligent attempts were undertaken to find and serve defendants under other rules. Further, the pleadings offer no explanation as to why other means better calculated to impart actual notice than publication were not reasonably available.

While it may very well be that the unnamed members of the office staff and the anonymous outside investigative agencies did everything necessary to constitute an effective good-faith effort under GCR 1963, 105.8, from the record before us we just do not know. As stated in *Thompson* v *Shiawassee Circuit Judge*, 54 Mich 236, 237; 19 NW 967 (1884):

> "The affidavit should state the facts of inquiry and investigation, so that the court can see that the conclusion that the party cannot be found for the reason stated is a reasonable one upon such facts."

The plaintiffs bear this burden so that the trial judge and appellate bench may make an informed and reasonble determination.

(continued from previous page)

"2. That plaintiffs verily believe that Fanny Mae Davis' last known address has been 705 Dixon Street, Clarksville, Tennessee; and, defendant, Louis Scott is presently on parole to the Michigan State Department of Corrections, but has not reported to his parole officer for a long period of time, and his present whereabouts are unknown to his parole officer, and, defendants Paul Hines and Willie Davis' whereabouts are totally unknown to plaintiffs.

"3. That plaintiffs have made diligent attempts through members of their office staff and outside investigative agencies to locate the defendants, but has [sic] been unable to do so."

The nature and extent of efforts to locate and notify parties under normal methods of service, sufficient to justify the ordering of substituted service under Rule 105.8, will vary according to the circumstances presented in each case. However, the efforts required should be evaluated at least in part according to the type of substituted service proposed by the party seeking relief.

In this case, the plaintiffs requested substituted service by publication and mailing to one defendant's last known address. Under this rule, the use of publication as a notice-giving device should be limited to discrete circumstances where a strong specific factual showing is made that notice cannot reasonably be effectuated in the manner provided under other rules and that means which are better calculated to give notice than publication are not reasonably available or feasible.

Therefore, we remand the *Rodgers* case to the trial court so that plaintiffs may be permitted to show that they did indeed satisfy the requirements of GCR 1963, 105.8. If plaintiffs can demonstrate to the trial judge's satisfaction that, prior to the time substituted service was originally ordered, they had exercised due diligence to locate defendants but were unable to serve them under other rules and that means better calculated to give actual notice than publication were not feasible, the judgments of the trial court and the Court of Appeals shall be affirmed. If plaintiffs are unable to make such a showing, we would reverse and require the trial court to enter an appropriate order of dismissal.

Krueger is reversed and remanded for further proceedings in accordance with this opinion.

/s/ JOHN W. FITZGERALD /s/ CHARLES L. LEVIN
/s/ BLAIR MOODY JR. /s/ G. MENNEN WILLIAMS

STATE OF MICHIGAN
IN THE SUPREME COURT

ESTHER V. KRUEGER,
Plaintiff-Appellant,

v

No. 59-743

ALICE J. WILLIAMS,
Defendant-Appellee.

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs-Appellees,

v

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants-Appellees,

No. 61861

v

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant-Appellant.

BEFORE THE ENTIRE BENCH

RYAN, J. *(dissenting* in *Krueger; concurring* in *Rodgers)*

Krueger

I dissent from the opinion of the Court in *Krueger* because I am not persuaded that the trial court abused its discretion in refusing to permit the particular substituted service requested by the plaintiff-appellant.

Our court rule is explicit. GCR 1963, 105.8 provides:

> "The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules."

While minimum due process standards might be satisfied in a given case by service of process upon a liability insurance carrier, it is for the trial judge to determine, in the exercise of his discretion, on a case-by-case basis whether a specifically proposed "other manner" of service "is reasonably calculated to give *** actual notice ***." Here, the trial judge was informed that the insurance company had received no premium payments and had no contact with the insured for almost three years. He also knew that the plaintiff's letter to the defendant's last known address had been returned unopened and that the best efforts of two investigators failed to locate the defendant. Certainly in the face of those facts the trial judge committed no abuse of discretion in concluding

that service upon the insurance carrier was not "reasonably calculated to give [defendant] actual notice" of the lawsuit.

By the adoption of GCR 1963, 105.8, this Court determined that the minimal due process requirements of notice of the pendency of a civil lawsuit would not be the standard in Michigan. Rather, for us, the right to obtain service of process in a manner other than that "provided for under other rules" was made dependent upon the judgment of the trial court in the exercise of its discretion that such "other manner" is reasonably calculated in a given case to give "actual notice" of the pendency of the proceedings.

In my view the trial judge in this case did not abuse his discretion in declining to approve the service upon the liability insurance carrier, given the facts with which he was presented.

Rodgers

I concur in the reasoning and conclusion of my colleagues in the majority with respect to *Rodgers*.

/s/ JAMES L. RYAN
/s/ THOMAS GILES KAVANAGH
/s/ MARY S. COLEMAN

Notice of Appeal to The Supreme Court of The United States

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs-Appellees,

vs.

FANNIE MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants-Appellees,

vs.

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant-Appellant.

Supreme Court No. 61861
Court of Appeals No. 77-1107
Lower Court No. 70 162 185

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Detroit Automobile Inter-Insurance Exchange, Garnishee Defendant-Appellant, hereby appeals to the Supreme Court of the United States from the Final Order of the Supreme Court of the State of Michigan, construing GCR 1963, 105.8 as authorizing service of process by publication alone to obtain personal jurisdiction

over a defendant and sustaining the validity of that Court Rule against a challenge premised upon the Fourteenth Amendment to the United States Constitution, entered February 3, 1981.

This Appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

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DATED: March 20, 1981

NOTICE OF APPEAL

STATE OF MICHIGAN
IN THE SUPREME COURT

ESTHER V. KRUEGER,
Plaintiff-Appellant,

-vs-

ALICE J. WILLIAMS,
Defendant-Appellee.

Supreme Court
No. 59743

Court of Appeals
No. 23980

Lower Court
No. 74 15502 NI

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Alice J. Williams, Defendant-Appellee, hereby appeals to the Supreme Court of the United States from the Final order of the Supreme Court of the State of Michigan, construing GCR 1963, 105.8 as authorizing service of process on a defendant's liability insurer to obtain personal jurisdiction over a defendant and sustaining the validity of that Court Rule against a challenge premised upon the Fourteenth Amendment to the United States Constitution, entered on February 3, 1981.

This Appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

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PROOF OF SERVICE

STATE OF MICHIGAN
IN THE SUPREME COURT

ESTHER V. KRUEGER,
Plaintiff-Appellant,

-vs-

ALICE J. WILLIAMS,
Defendant-Appellee.

Supreme Court No. 59743
Court of Appeals No. 23980

PROOF OF SERVICE

STATE OF MICHIGAN
ss:
COUNTY OF WAYNE

Lower Court No. 74 15502 NI

Proof of Service

PATRICIA MARIE MCLAUGHLIN, being first duly sworn, deposes and says that on the 20th day of March, 1981, she mailed copies of the Notice of Appeal to the Supreme Court of the United States and Proof of Service, to:

Thomas H. Hay, Esq.
CHURCH, WYBLE, KRITSELIS,
ANDERSON & ROBINSON, P.C.
3939 Capital City Boulevard
Lansing, MI 48906

Clerk of the Court
Circuit Court for the
County of Kent
Hall of Justice
333 Monroe Avenue, N.W.
Grand Rapids, MI 49503

by placing same in the United States Mail, postage prepaid, and properly addressed.

/s/ PATRICIA MARIE MCLAUGHLIN

Subscribed and sworn to before me this 20th day of March 1981.

/s/ DIANE M. GOODSITE
NOTARY PUBLIC,
WAYNE COUNTY, MICHIGAN

My commission expires: 12-21-81

ORDER STAYING PROCEEDINGS

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF KENT

ESTHER V. KRUEGER,
Plaintiff,

-vs-

ALICE J. WILLIAMS,
Defendant.

ORDER STAYING PROCEEDINGS

At a session of said Court, held in the Hall of Justice in the City of Grand Rapids, Kent County, Michigan on April 6, 1981

PRESENT: HONORABLE ROMAN J. SNOW, CIRCUIT COURT JUDGE.

The Court having reviewed the above Stipulation and being otherwise duly advised in the premises;

IT IS HEREBY ORDERED that any and all proceedings in this Court in the above-captioned matter be, and the same are, hereby stayed pending exhaustion of appellate remedies or further Order of this Court or the Supreme Court of the United States.

IT IS FURTHER ORDERED that no stay bond be required.

ROMAN J. SNOW
CIRCUIT COURT JUDGE

Approved as to form;
Notice of Entry Waived:

BY: /s/ THOMAS H. HAY (P14761)
BY: /s/ CARL L. GROMEK (P23903)

ATTEST: A TRUE COPY
/s/ DONNA SANFORD
Deputy County Clerk

MAY, 1981

Office - Supreme Court
FILED
JUN 1
ALEXANDER L. STEVAS, CLERK

File No. 80-1862

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ALICE J. WILLIAMS,
Appellant,

-vs-

ESTHER V. KRUEGER,
Appellee

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS APPEAL AND/OR AFFIRM JUDGMENT

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IN THE SUPREME COURT
OF THE UNITED STATES

ALICE J. WILLIAMS,
Appellant,

-vs-

ESTHER V. KRUEGER
Appellee

APPELLEE'S MOTION TO DISMISS APPEAL AND/OR AFFIRM JUDGMENT

Now comes Esther V. Krueger, Appellee by and through her attorneys Church, Wyble, Kritselis, Anderson & Robinson, P.C. and hereby moves the Court pursuant to Supreme Court Rule 16 to dismiss the appeal and/or in the alternative to affirm the judgment sought to be reviewed and states as follows:

1. The present appeal seeks to reverse a decision of the Michigan Supreme Court holding that a Trial Judge has the authority to determine on a case by case basis whether or not to exercise its discretion and allow some means of substituted service other than those specifically set forth in the local Court Rule which would comport with the due process requirements of notice guaranteed under the 14th Amendment.

2. The issue sought to be reviewed does not present a substantial Federal question because the method of substituted service authorized in this case is limited to its particular facts. The Court did not allow similar service in any or all cases to be presented in the future, but required each case to be decided individually on its own facts. The trial court must be satisfied that the plaintiffs have shown with particularity that service of process could not reasonably be made according to any prescribed method and that "no better alternative means of giving notice were available" other than the manner being requested before it can exer-

cise discretion and allow service. In the consolidated case of *Rodgers* v *Davis*, 410 Mich 144, 300 NW 2d 910 (1981) the Court reversed authorized service by publication holding that the trial court improperly exercised its discretion without requiring a factual affidavit showing exhaustion of all other means of service.

3. The issue sought to be reviewed concerns only notice and not jurisdiction and as such presents insubstantial issues which need no further argument. This Court has repeatedly held, since *Mullane* v *Central Hanover Bank & Trust Co*, 330 US 306, 70 S Ct 652, 94 L Ed 865 (1950), that due process does not in all cases require actual notice. All that is required is the means best calculated to give actual notice. To accept appellant's assertions, actual notice would be required in all cases and where the defendant could not be found as in the present case, litigation could not proceed. Such a ruling would be manifestly inconsistent with numerous decisions of this Court and the many Federal and State Courts which have relied upon those decisions fashioning procedural rules for service of process to protect the State's interest in providing a means of civil redress for injured citizens.

Wherefore, Appellee requests this Court to grant her Motion to Dismiss the Appeal or in the alternative to Affirm the Judgment of the Michigan Supreme Court and award her costs to be taxed.

Respectfully submitted,
CHURCH, WYBLE, KRITSELIS,
ANDERSON & ROBINSON, P.C.
By: (s) Thomas H. Hay (P14761)
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Lansing, Michigan

Dated: May 14, 1981

LAW AND ARGUMENT

I. SUBSTITUTED SERVICE UPON APPELLANT'S INSURER WAS NOT AUTHORIZED AS THE ONLY MEANS OF NOTICE NECESSARY.

The issue presented to this Court does not concern the jurisdiction of the State of Michigan over the defendant whether *in personam* or *in rem*. Contrary to Appellant's assertions, the service of process issue was never alleged to be nor considered as a "basis for judgment imposing personal liability".

Under the rationale of *International Shoe Co* v *Washington*, 326 US 310, 66 S Ct 154, 90 L Ed 94 (1945) as recently reaffirmed and expanded by *Shaffer* v *Heitner*, 433 US 187, 97 S Ct 2569, 53 L Ed 2d 683 (1977) the State of Michigan has sufficient minimum contracts to assert *in personam* jurisdiction over the defendant. The accident occurred within the State of Michigan. The plaintiff was a resident of the State of Michigan at the time of the accident. Allegedly the appellant was also a resident of the State of Michigan at the time of the accident. Both were insured by Detroit Automobile Inter-Insurance Exchange which does business in the State of Michigan and issued policies of insurance in Michigan covering both the plaintiff and defendant at the time of accident. Michigan clearly had jurisdiction over the person of the defendant. Service of process personally was not needed and was never asserted as a means of achieving personal jurisdiction.

The only issue decided by the Michigan Supreme Court was the requirement of notice by service of process, not jurisdiction. Appellant also misstates this aspect of the case by construing the Supreme Court's decisions as allowing substituted service upon an individual's liability insurer as the "only means of notice necessary to support a personal judgment against that individual." Far from being the *only* means of notice the Court Rule requires an exhaustion of any and all possible means of actual notice and substituted

service before application can be made to the Court for an Order allowing substituted service under MGCR 105.8.

This requirement of the Court Rule was affirmed by the Court's Opinion in *Krueger* v *Williams*, 410 Mich 144, 300 NW2d 910 (1981). The Court also mandated that before substituted service could be found to comply with due process requirements the trial court must require an affidavit of facts establishing a "truly diligent search for an absentee defendant" and that "no better alternative means of giving notice" are available (p. 38a) Appellant's mischaracterization of the Court's Opinion totally disregards the individual discretionary aspect of the Court Rule and the requirements for exercising that discretion on a case by case basis as set forth by the Court. It also ignores the exhaustion of all other means of substituted or actual service undertaken by the appellee in this case.

After filing her complaint plaintiff attempted diligently to locate the whereabouts of defendant Williams. Plaintiff hired an investigator through a law firm in the City of Grand Rapids where defendant was last known to reside. Affidavits submitted to the trial court indicated the efforts of the investigator including checking the last two known addresses in Grand Rapids and also the Post Office and Michigan Driver Records information for a current address. Upon finding an application for out of State license issued in Arkansas the Arkansas driver information file was obtained and a new address in Arkansas located.

Plaintiff attempted service of process by compliance with the Michigan Non-Resident Statute, MCLA 257.403; MSA 9.2103. However, because the letter was returned unopened this type of service was unavailable based upon *Tomkiw* v *Sauceda*, 374 Mich 381; 132 NW 2d 125 (1965) requiring a signed return receipt form to effectuate service of process under the Statute.

Additional investigators were hired and affidavits submitted showing a search for the defendant in Grand

Rapids, checking the divorce records at the County Clerk's office and County Department of Social Services records. Further leads were followed on the whereabouts of defendant through her son and acquaintenances and credit checks were made through local Credit Exchanges and the Secretary of State's Office. Based upon this evidence the Supreme Court found a "sufficient showing has been made to justify relieving a party from compliance with methods of service specifically prescribed by court rule or statute." (37a).

At the same time, the Court in the consolidated case of *Rodgers* v *David, supra*, held insufficient a verified Motion for Substituted service which failed to recite by specific fact, under oath, the efforts taken to locate the absentee defendant. The Court therefore reversed the decision in *Rodgers* remanding it to the trial court to determine if plaintiffs could satisfy the requirements of the local rule and demonstrate that they exercised due diligence but were unable to serve the defendant and that means better calculated to give actual notice other than that proposed were not feasible. In *Rodgers* the trial court had allowed service by publication.

The *Krueger* decision clearly indicates that service alone by publication or by service upon the insurer is never justified as the only means of notice necessary to commence litigation. Instead the Court Rule as applied by the Michigan Supreme Court requires all other means of substituted service in addition to an exhaustion of all possible means of direct personal service before a trial court can exercise its discretion to allow some other means of substituted service. *See, Felix* v *Felix*, 47 Mich App 744 (1973) (Service upon liability insurer denied for failure to exhaust other means of substituted service).

II. APPELLANT'S POSITION WOULD REQUIRE ACTUAL NOTICE IN ALL CASES TO ACHIEVE PERSONAL JURISDICTION.

The Michigan Rule allowing application to the trial court for a means of substituted service when personal service cannot be obtained is merely a recognition that actual notice and service of process cannot and need not be obtained in all cases. This court reached the same conclusion in *Mullane* v *Central Hanover Bank & Trust Co*, 339 US 306, 70 S Ct 652, 94 L Ed 865 (1950). It was this decision which the Michigan Court relied upon in authorizing the substituted service in the present case.

> It is important to note that *Mullane* acknowledged the possibility that the means chosen would never reach the defendant.
>
> "[I]t has been recognized that, in the case of persons missing or unkown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, *supra* 317."
>
> This language reflects an awareness that there may be situations in which an injured plaintiff will not be denied a cause of action even though a defendant cannot be found." (28a-29a)

The Michigan Court Rule also incorporates the due process test set forth in *Milliken* v *Meyer*, 311 US 457; 61 S Ct 339; 85 L Ed 278 (1940). That court held that the notice requirements of due process are satisfied if the method chosen is "reasonably calculated to give actual notice of the proceedings and an opportunity to be heard." In *Walker* v *Hutchinson*, 352 US 112, 77 S Ct 200; 1 L Ed 2d 178, 182 (1956) the court reiterated the requirements of adequate notice under the due process clause in cases of absentee,

missing, or unknown defendants. Referring to the *Mullane* decision the court quoted:

> We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.

From the above cases it is clear due process requirements of the 14th Amendment do not require actual notice in the case of absentee or missing defendants. What is required "is the procedure best calculated to give notice under the particular circumstance." In this case the court exercised its discretion and concluded that notice upon the defendant's insurer was the best means feasible to give notice under the circumstances of this case. The court did not adopt rigid and fixed formulas and did not hold that service upon an insurer in any other case was valid or consistent with due process.

To accept defendant's argument this Court would be required to interpret due process as requiring actual notice in all cases. Whether plaintiff proceeds upon substituted service by serving the insurer or by publication the effect upon the defendant insurance company is the same. Defendant would as vigorously oppose service by publication if it were approved in the *Krueger* case as it is opposing service upon the defendant's liability insurer. The objection to such substituted service in either case is the lack of adequate notice. It is instructive to note that the defendant, although present at all hearings in the Circuit Court, the Court of Appeals and the Supreme Court at no time ventured to suggest a means of substituted service which was better calculated to give actual notice. The Plaintiff requested substituted service not only by serving the insurance carrier, but also by any other means the court saw desireable

or better calculated to give actual notice under the circumstances. Plaintiff requested service by publication or any other means the defendant or the court would suggest.

The issue is whether the due process clause should be used to allow a defendant to successfully evade personal service of process and therefore defeat a plaintiff's right to proceed with her cause of action and be compensated for negligently inflicted injuries. Defendant's contention that the due process clause requires this inequitable result cannot withstand scrutiny.

In *Olberding* v *Illinois Central R Co,* 346 US 338; 341; 745 S Ct 83; 98 L Ed 39, (1953) this court noted that:

> The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself.

This observation is more true today. Since 1953 the use of the automobile has increased tremendously.

> If the courts deny a chance for recovery in the instances where the defendant cannot be personally served, many an injured plaintiff will go without recompense and the courts would, as a practical matter, be rewarding the defendant who absented himself. *Note, Civil Procedure–Constitutionality Of Constructive Service of Process On Missing Defendants,* 48 NC L Rev. 616, 619 (1970).

The effects of the atuomobile in a mobile society upon the due process requirement of notice was recently noted by this court in *Shaffer* v *Heitner,* 433 US 186, 97 S Ct 250, 53 L Ed 2d 683, 696 (1977).

> The advent of automobiles, with the con committant increase in the incidence of individuals causing injury in

> States where they were not subject to in personam actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power. This modification, like the accommodation to the realities of interstate corporate activities, was accomplished by use of legal fiction that left the conceptual structure established in *Pennoyer* theoretically unaltered.

It was the same factor which the Michigan Supreme Court relied upon in allowing substituted service to preserve the plaintiff's cause of action against the absent defendant in *Krueger*. The court found that the rule allowing application to the trial court for substituted service was consistent with the State's interest in providing its citizens with a means of civil redress in view of an ever mobile society:

> The rule adopts a liberal approach to service of process which recognizes the mobility of contemporary society and the state's interest in providing recompense for injured plaintiffs. (28a).

Defendant, faced with the consistent rulings of this court and the expanding nature of the due process clause over the past 20 years attempts to distinguish *Mullane* and its progeny on the basis of property versus human rights. Defendant's distinctions are not only illogical but abhorent to the very nature of the judicial system as a means of settling civil wrongs and providing civil redress for intentional or negligently inflicted injuries.

Defendant contends that *Mullane* can be distinguished because it involved the cessation of property rights which defendant views as "a systemic necessity." It is interesting that this argument follows the decision of *Shaffer* v *Heitner*, *supra*, in which this court did away with the *Pennoyer* distinction between *in rem* and *in personam* jurisdiction requiring a finding of minimum contacts to assert either. Thus, at a time when this Court is moving ahead by abolishing the distinctions between *in rem* and *in personam*

jurisdiction defendant argues that that distinction should be reincarnated for the notice aspect of due process.

Defendant's argument that the state's interest in providing civil redress for its citizens who suffer injury at the hands of negligent defendants is "by no means vital in the same sense as the ability to determine interests in property or other matters" is not only illogical but contrary to the purpose and spirit of the Constitution in protecting individual liberties and creating a judicial branch of the government to provide its citizens with a means of civil redress. Michigan at least has recognized that interest in life is paramount to interest in property and that the State's interest in protecting its citizens is paramount to the State's interest in protecting its trust funds. Because a State chooses to regard its citizenry and their wellbeing as vital far and above property interests is no reason to abolish over 20 years of due process evolution and precedent. At the very least, the health and wellbeing of Esther Krueger is equal to and deserves the same due process protection as the property interests of Detroit Automobile Inter-Insurance Exchange. If the due process clause permits litigation to protect appellant's "systemically vital" property interest in a policy of insurance, it must necessarily provide the same means to preserve the plaintiff's life and wellbeing.

In reaching its decision the Michigan Supreme Court had the benefit of well-reasoned decisions from the jurisdictions of New York and New Jersey. The court relied upon and affirmed the balancing rationale used by the highest courts in those jurisdictions as providing a logical well reasoned resolution to the issue of whether the defendant should be allowed to avoid responsibility by absenting himself and thus defeating a plaintiff's right to relief. *Feuchtbaum* v *Constantini*, 59 NJ 167, 280 A 2d 161 (1971); *Dobkin* v *Chapman*, 21 NY 2d 490; 236 NE 2d 451 (1968). The court also took notice of the decision of *Manley* v *Nelson*, 50 Ha 484, 443 P 2d 158, cert denied sub nom *Soska* v *Manganaro*, 394 US 573, 89 S Ct 1299, 22 L Ed 2d

555 (1969). In that case the Hawaii Supreme Court upheld substituted service upon a non-resident defendant driver by publication. This court saw no reason to review that decision.

Defendant has attempted to distinguish and challenge the reasoning of these cases on appeal, but to no avail.

Defendant admits receipt of actual notice is not required in each instance. (Brief p. 18). However, as previously noted defendant fails to suggest what alternative means of substituted service would be better calculated to give actual notice than the means suggested by plaintiff and approved by the Supreme Court. Instead, defendant contends there is no reason to expect that it, as the defendant's insurer, would be more successful in locating the absent defendant than the plaintiff. Such an argument overlooks the fact the defendant is a multi-million dollar corporation with offices in virtually every major city in Michigan and the Mid-West and does business in a number of the states in this country. Indeed, some insurers have offices and do business in every state and major city in the country. To suggest that it would have no better means at hand of discovering or investigating the whereabouts of one of its insureds as would a private citizen stretches credibility. Secondly, defendant asserts that its interest in finding the defendant would not exist, but for the Michigan Supreme Court's decision in this case. This is an interesting admission to make when one considers that the defendant was actively engaged in negotiations and settlement of the Williams' claim. At the very minimum the defendant would have a right to be advised of the negotiations being undertaken by her insurer and the fiduciary relationship between the defendant and her insurer would mandate some communication. The Supreme Court noted that it was this obligation and this interest that the insurer had in regard to its insured, Alice Williams. (32a). Regardless of whether substituted service was authorized, it is clear that DAIIE had an obligation to defend and to represent the defendant in negotiations.

A balancing of the Plaintiff's needs, the public interest, the reasonableness of the plaintiff's efforts, and the safeguards to protect the defendant's interest as weighed by the Supreme Court in Michigan clearly mandate that some type of substituted service short of actual notice be authorized to allow plaintiff to proceed with her cause of action. The public interest and recognition of a citizen's right to seek damages for injuries and be compensated for those inuuries caused by the negligent or intentional acts of another are unquestioned. Indeed, in Michigan with the adoption of No-Fault Insurance every driver is required to be insured before he or she is allowed to operate an automobile. Insurance is required not for the protection of the negligent driver but for the protection of the citizen he injures. The mandatory insurance requirements of the No-Fault Act are but another expression of Michigan's public recognition that an injured party should be assured of a means and source of compensation in the event of negligently sustained injuries.

The public interest would best be protected by discouraging evasion of service of process whether deliberate or inadvertant. In this case there can be no question that Alice Williams recognized she was in an accident and in fact notified her insurance company DAIIE. It was the defendant who moved without a forwarding address and failed to take any efforts whatsoever to contact or notify her insurer or the plaintiff concerning the accident or possible claims arising out of it.

Additionally the public has an interest in encouraging insurers to keep in contact with their insureds especially after claims are made or accidents reported. In this case DAIIE made no efforts to keep in contact with its insured after the accident even though it openly and continuously negotiated with the plaintiff until the Statute of Limitations had almost run. It was only after the Statute of Limitations had in fact expired that DAIIE attempted to contact Alice Williams by placing a telephone call to her at her last

known address. These facts somewhat weaken the defendant's belated offer of compromise by allowing the Statute of Limitations to be tolled indefinitely until the defendant is located.

Service of process upon defendant's insurer under the facts and circumstances of this case is the means best calculated to give actual notice of the proceedings to the defendant. If it is not, plaintiff requests that DAIIE suggest a means better calculated to give notice and plaintiff will procure substituted service in that manner.

The purest of fiction in this case is that the defendant's insurer DAIIE is at all concerned with protecting the rights of Alice J. Williams. Defendant's insurer is concerned only with protecting its rights in a policy issued to Alice J. Williams. Thus, DAIIE does not offer a better means of substituted service and notice to defendant Williams, but insists that plaintiff cannot recover. DAIIE has for the past 10 years taken no action to locate Alice Williams other than one telephone call 3 years after the accident. To adopt a policy of encouraging insurers to lose contact with their insureds and fostering the situation in which that insurer can gain economic benefits if its insured can effectively evade service of process is contrary to the public interest, fundemental fairness and due process guaranteed by the 14th Amendment.

CONCLUSION

The issues sought to be reviewed in the present case do not involve substantial Federal questions. This court has in the past refused to consider the same arguments raised which concern only the giving of notice and not the scope of jurisdiction. Given the firm basis of jurisdiction in Michigan over the defendant due process requires only the best means calculated to give actual notice of the proceedings be utilized.

RELIEF REQUESTED

Wherefore Defendant-Appellee requests this court to affirm the judgment of the Michigan Supreme Court and/or in the alternative dismiss the present appeal or deny certiorari. Appellee requests costs to be taxed.

Respectfully submitted,
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